CRACKS IN THE ARMOR OF THE SELF-INCRIMINATION CLAUSE OF THE FIFTH AMENDMENT: AN ACCUSED'S TESTIMONIAL DILEMMA

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PREFACE

The work which is set forth in the following pages is the product of an investigation which encompassed the better part of an entire year. While it bears the name of a sole individual, the writer would be remiss in not indicating those to whom credit is due for the part they have played in his graduate legal education.

At the outset it should be noted that the year of study just completed could not have been realized but for the opportunity presented by the offices of the Chief of Naval Personnel and the Judge Advocate General of the United States Navy.

As Dean of Graduate Studies, Rafael C. Benitez (Rear Admiral, USN, Ret.) was responsible for making me aware of the opportunities available in my chosen field of study at the University of Miami School of Law and was constantly available for consultation and guidance, thus minimizing the stresses traditionally encountered by graduate students. For this I shall remain always grateful.

Appreciation is extended to Professor Clifford C. Alloway for his counsel and criticism, both of which materially influenced the completion of this thesis.

To Professor Fred W. Doerner, Jr., whose compassionate concern, assistance and understanding saw the writer through the darkest hour, I wish to acknowledge a continuing debt of gratitude.

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The manuscript could not have been put in final form without the secretarial skills of Mrs. Bettye Newton to whom I am most grateful.

To my wife, Marilyn, who lived through every minute of my graduate school experience along with me, anything which could be added to that which has already passed between us would merely be redundant.

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CHAPTER I.

INTRODUCTION

As this thesis is being written, the Nation is caught up in events which are unsurpassed in importance by any heretofore experienced in our history. For the second time in just less than two hundred years a President faces the possibility of impeachment. The underlying act which precipitated this procedure of constitutional last resort was the burglarizing of the Democratic Party's national headquarters at the Watergate complex in Washington. Subsequent probing by various entities has uncovered other acts steeped in alleged criminality attributable to public officials at the highest levels of government. Numerous individuals who have been ensnared by the ever-expanding web of complicity have found themselves in the throes of a dilemma--either to answer questions propounded by those seeking incriminating evidence or face criminal sanctions as the price of silence.[1]

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[1]The most recent example is that of G. Gordon Liddy, one of the seven original conspirators involved in the Water-

All of this serves to bring into sharp focus a basic conflict between the testimonial rights of the individual and the compulsive powers of the government within the realm of the criminal justice system. Despite the protections embodied in the Fifth Amendment[2] individuals in every stratum of our society daily find themselves in the position of having to choose between a penalty for remaining silent or succumbing to the overwhelming power wielded by the instrumentalities of the state and by so doing subjecting themselves to consequences which are at least equally onerous.

This dilemma is shared by the criminal defense attorney who must be able to predict accurately the use to which statements, which have been or may be made by his client, might be put by the prosecution. In advising his client with respect to such matters so that the client may come to an educated

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gate burglary, who was adjudged guilty on two counts of contempt of Congress for his failure to testify before a House subcommittee concerning related aspects of the case, and who is currently incarcerated for his failure to testify before a federal grand jury which delved into similar matters. The Miami Herald, May 11, 1974, § A, at 30, col. 1. The action was the result of a contempt action voted by the House in early fall, 1973. Id., September 11, 1973, § A, at 2, col. 3.

[2]U. S. Const. amend. V provides in pertinent part that "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

decision relating to his future course of action[3] the attorney must consider a wide variety of possibilities. If the client faces a future criminal prosecution subsequent to alleged illegal police activity, the effect of the client's disclosures while in custody or his testimony given during a pretrial motion to suppress evidence must be viewed in the light of their possible use by the prosecution during the trial on the merits. One who has been subpoenaed to appear and testify before a state or federal grand jury, administrative agency, or legislative committee needs to be informed of the price which may be exacted for either compliance or recalcitrance. Similarly, clients forced to come to grips with mandatory medical examinations and mandatory disclosure statutes will be required to make hard choices. No less difficult is the position of one who is called as a witness in a civil or criminal case or one who is the unwilling subject of a quasi-judicial proceeding.

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[3]It is beyond question that while the attorney has the initial responsibility to inform his client fully of relevant considerations, as well as the possible effect of alternatives, the ultimate responsibility for decisions such as whether or not the client will speak in his own behalf reposes in the client. ABA Code of Professional Responsibility, Ethical considerations 7-7, 7-8; ABA Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function, § 5.2 (Approved Draft, 1971).

While the primary sources of information available to the attorney are statutes and case law, he would do well to consider the various uniform rules and codes which have been the object of the labors of bench, bar, and scholars in a continuing effort aimed at improving criminal jurisprudence. Scrutiny of the Uniform Rules of Evidence,[4] the Model Code of Evidence,[5] and the Model Penal Code[6] often provides the practitioner with valuable insight concerning the evolution of existing law. The Federal Rules of Evidence,[7]

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[4]Uniform Rules of Evidence (1953).

[5]Model Code of Evidence (1942).

[6]Model Penal Code (Proposed Official Draft, 1962).

[7]Originally entitled Rules of Evidence for United States Courts and Magistrates, these Rules were promulgated by the United States Supreme Court on November 20, 1972 pursuant to its authority to prescribe rules of practice and procedure for the federal courts under the provisions of 18 U.S.C. §§ 3402, 3771, 3772 (1970) and 28 U.S.C. §§ 2072, 2073 (1970). 56 F.R.D. 184 (1972). They were submitted to Congress on February 5, 1973 and were scheduled to become effective automatically on July 1, 1973. 119 Cong. Rec. H5452 (daily ed. June 26, 1973)(remarks of Representative Hungate); 56 F.R.D. 184 (1972). However, Congress subsequently enacted legislation which precluded the Rules from having force or effect pending express approval by act of Congress. Act of March 30, 1973, Pub. L. No. 93-12, 87 Stat. 9; U.S. Code Congressional and Administrative News, 93d Cong., 1st Sess. (1973) at 11. An amended version of the Rules passed in the House by roll call vote on February 6, 1974 and was referred to the Senate Committee on the Judiciary the following day. Digest of Public General Bills and Resolutions, 93d Cong., 2d Sess., First Issue, Library of Congress, 1974 at 209.

probably a model for future state enactments,[8] undoubtedly will affect the rights of criminal defendants in both federal and state courts.

In the pages that follow the writer will analyze the cases and statutes which are inextricably intertwined with the situation involving compulsory testimonial[9] self-incrimination. Where such is applicable, a discussion of one or more of the uniform codes and rules will be included. The object of this effort is an attempt to put into proper perspective a long cherished constitutional protection which, when viewed in the context of numerous specific factual settings, proves all too often to be merely illusory.

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[8]The promulgation of rules for use in federal court has historically been shown to have an impact upon practice and procedure in state courts since the states have tended to follow the federal lead. E.g., Fed. R. Crim. P.; Fed. R. Civ. P.

[9]It was early held by the Supreme Court that whether or not an activity was testimonial in nature depended upon whether or not such was "communicative." Holt v. United States, 218 U.S. 245, 252-253 (1910). While one authority advocates that communicativeness should be limited, in this context, to spoken words, 8 Wigmore, Evidence § 2263, at 378-379 (McNaughton rev. 1961), such a view has not found favor with the Court. See Schmerber v. California, 384 U.S. 757, 763 n. 7 (1966). Another view, asserted to reflect the weight of authority, is that communicativeness includes not merely spoken words but also actions intended to communicate thoughts. See McCormick, Evidence § 124, at 265 (2d ed. 1972). It is regard for the latter that necessitates an investigation of those issues raised by the mandatory disclosure statutes.

CHAPTER II.

STATEMENTS COMPELLED BY ILLEGAL POLICE ACTIVITY: THE HARRIS-SIMMONS-WALDER TRILOGY

"We are well on our way to forbidding any utterance of an accused to be used against him unless it is made in open court." These words, expressed in apparent despair by the then circuit judge Warren E. Burger in his partial dissent in an oft overlooked case,[10] portended an inevitable result. This sentiment stemmed from what judge Burger saw as a natural consequence of Miranda[11] which consisted of the production of intricate procedural rules which, in application, hampered the efforts of even the most able advocates and jurists as well as those of the police. Three years later, as Chief Justice of the United States Supreme Court, Warren E. Burger had an opportunity to rectify, at least in some measure, a situation viewed by some as having

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[10] Frazier v. United States, 419 F.2d 1161, 1176 (D.C. Cir. 1969).

[11] Miranda v. Arizona, 384 U.S. 436 (1966).

gotten completely out of hand. However, in the process, the Court sanctioned activity which runs completely counter to the belief that convictions in criminal cases which are based wholly or in part upon confessions are objectionable in that a system which is subject to extreme abuse is thereby fostered.[12] Nonetheless the judicial barriers theretofore carefully erected to preclude testimonial evidence, compelled from the criminal accused through illegal police procedures, from being utilized in court were severely damaged.

When the Court undertook to decide Harris v. New York[13] it had to face squarely the fact that the evidence which aided the prosecution in obtaining the petitioner's conviction in state court was the product of unlawful police activity.[14] Harris had been charged, subsequent to indictment, with the sale of narcotics to a police undercover agent on two occasions. This agent testified at trial and was essentially the only witness against the accused.[15]

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[12] Escobedo v. Illinois, 378 U.S. 478, 488-489 (1964); cf., Haynes v. Washington, 373 U.S. 503, 519 (1963).

[13] 401 U.S. 222 (1971).

[14] Id. at 223-224.

[15] Another officer testified with respect to collateral details of the sales; a third officer's testimony related to chemical analysis. Id. at 222.

At the conclusion of the state's case in chief the accused testified in his own behalf[16] and repudiated the first transaction while describing the second as a deception wherein the subject of the "sale" was two glassine bags containing baking powder.[17] On cross-examination Harris was asked whether or not he had made certain statements to the police subsequent to his arrest which specifically related to these events. In response, the accused indicated that he did not remember and the court gave a limiting instruction to the jury to the effect that the statements which the prosecution sought to attribute to the defendant could not be used as evidence of guilt but were to be restricted to the issue of credibility. Notwithstanding this instruction Harris was convicted of the offense relating to the second transaction.

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[16] The common law disability which precluded a defendant in federal court from taking the witness stand has long been abrogated by statute and case law. See 18 U.S.C. 3481 (1970) formerly ch. 37, 20 Stat. at L. 30 (1878); Bruno v. United States, 308 U.S. 287 (1939). The same is true in state court prosecutions. See 2 Wigmore, Evidence § 488 (3d ed. 1940)(collecting statutes and cases); McCormick, Evidence § 65 at 144 (2d ed. 1972); 58 Am. Jur. Witnesses § 106 (1948).

[17] 401 U.S. at 223; id. at 226.

Chief Justice Burger, writing for the majority,[18] was quick to characterize as dicta those comments in Miranda[19] which indicated that statements of the accused which were obtained by illegal police activity were inadmissible for any purpose.[20] Seemingly preoccupied with the notion that since an accused allegedly made a statement out of court which was inconsistent with his trial testimony then the latter must be untrue,[21] the majority avowed that perjured testimony would not be allowed to stand uncontradicted merely because illegal police action had produced evidence which, but for the illegality, the prosecution would have had available as a countervailing weapon.[22] Characterizing the prosecution's use of Harris' prior statements as merely a part of "traditional truth-

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[18] Joining in the opinion were Justices Harlan, Stewart, White and Blackmun. Justice Brennan filed a dissenting opinion joined by Justices Douglas and Marshall; Justice Black dissented without opinion.

[19] Miranda v. Arizona, 384 U.S. 436 (1966). This view has also been favored by some scholars. See, e.g., 2 Wright, Federal Practice and Procedure § 408 at 110 (1969).

[20] 401 U.S. at 224.

[21] Id. at 225.

[22] Id. at 224.

testing devices of the adversary process,"[23] the majority view indicates, via example, how far it has missed the mark. Asserting that an accused, who has confessed to a homicide and led the police to the victim under circumstances which would make his confession inadmissible, should not be allowed to deny, unopposed, by way of testimony at trial, his prior statements,[24] the opinion overlooks a vital distinction. In the hypothetical case complicity was demonstrated by words and an act. The latter serves to add a measure of credibility to the former. In the case under consideration only statements were involved. The net effect of allowing the jury to hear the out-of-court statements allegedly attributable to the accused was to pit the word of a police officer against that of the defendant, aptly noted by the minority opinion as being highly prejudicial in such a context, especially when the officer's testimony did not convince the jury respecting the first offense charged.[25] Had the jury not heard the substance of the statements it would have been free to decide the

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[23] Id.

[24] Id. at n. 2.

[25] Id. at 229 n. 2.

ultimate issue upon in-court credibility without having to resort to the much denounced practice of attempting to consider the statements only in regard to the credibility issue.

The majority opinion points out that Harris did not claim that the extra-judicial statements were involuntary or coerced, intimating that a different issue would be raised had this been asserted.[26] Implicit in this observation is that, since the petitioner made no move to challenge the statements on either or both of these bases, the statements must be viewed as being trustworthy. As such, exclusion on the basis of restraining impermissible police conduct would be unwarranted and the antithesis of the rationale underlying the judicially created exclusionary rule. However, as recognized by the dissenters, deterring illegal police conduct is not the main objective of the judiciary in these cases; rather it is the preservation

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[26] The opinion conditions the utilization of evidence, made inadmissible by police failure to follow the dictates of Miranda, on the requirement that the traditional standards regarding confessions have to be met. Id. at 224. In this regard completely ignored is the recognition in Miranda that while statements made during in-custody interrogation might not be thought of as involuntary in traditional terms, custodial interrogation is inherently coercive, Miranda v. Arizona, 384 U.S. 436, 457-458 (1966), and thus statements obtained without adequate safeguards are untrustworthy.

of the adversary system with its inherent respect and dignity for citizens which is predicated upon the provisions of the Fifth Amendment.[27] As such, admissibility of evidence should not be determined on the basis of considerations which tend to undermine recognized social objectives since to do so would encourage increased lawlessness.[28]

The possibility of such illegal activity is discounted by the majority which is instead content with further grounding its decision on the theory that the Weeks[29] doctrine should not be expanded to include impeachment situations. It does this by placing reliance on an earlier case[30] where prosecution witnesses were allowed to testify to contradict statements made by the accused during direct examination.[31] While it is true that "the Fourth and Fifth

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[27] 401 U.S. 222, 231-232 (1971).

[28] Id. at 232.

[29] Weeks v. United States, 232 U.S. 383 (1914) announced the judicial rule that in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure.

[30] Walder v. United States, 347 U.S. 62 (1954).

[31] The Harris majority erroneously noted that physical evidence was utilized for this purpose. Compare 401 U.S. 222 at 224 with 347 U.S. 62 at 64.

Amendments run almost into each other"[32] the Harris majority attempts to fuse them completely by the expediency of lifting language out of context to serve its own designs. The "illegal method" referred to in Walder[33] and quoted with approval in Harris[34] achieved that status due to a violation of the command of the Fourth Amendment. To utilize such rationale to defeat petitioner's claim which is founded entirely on Fifth Amendment grounds seems to go far afield. The implication seems inescapable that the majority was attempting both to reestablish the vitality of Walder which stood threatened in the wake of Miranda[35] and undermine to the greatest degree possible the holding of the latter case.

To do this the majority had to dispose of the sole remaining argument of the dissenters who obviously saw little hope that Miranda would be dispositive of the issue raised by the appellant in Harris. As their main thrust the minority sought to distinguish the case from Walder on the facts, characterizing that case as involving collateral

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[32] Boyd v. United States, 116 U.S. 616, 630 (1886).

[33] 347 U.S. 62, 65 (1954).

[34] 401 U.S. 222, 224 (1971).

[35] Miranda v. Arizona, 384 U.S. 436 (1966).

matters whereas the instant case involved matters which were directly concerned with the crimes charged.[36] The majority summarily dispatched that contention with the view that it was nonpersuasive adding that sufficient deterrence to illegal police activity is realized by precluding the prosecution's use of the tainted evidence in its case in chief[37]--an obvious gratuitous pronouncement directed toward the minority's foremost concern.

This concern was aptly illustrated the following term when essentially the same Court[38] denied certiorari in a case which also involved statements made by an accused while in police custody.[39] This time, however, instead of the statements relating to an act, as was the case in both Harris and Walder, the central issue at trial was that of intent. In Riddle the petitioner was charged with shooting a neighbor in the foot during an argument over the conduct

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[36] 401 U.S. 222, 227 (1971).

[37] Id. at 225.

[38] Justices Powell and Rehnquist had by this time taken the seats formerly occupied by Justices Harlan and Black. Since only Justice Harlan had voiced assent in Harris, the realignment would in no way tend to alter the disposition of similar cases.

[39] Riddle v. Rhay, 79 Wash. 2d 248, 484 P.2d 907, cert. denied, 404 U.S. 974 (1971).

of the latter's dog. After Riddle testified on his own behalf that he did not intend to discharge the weapon and that he did not have his finger on the trigger when it did, the prosecution was allowed to put before the jury another statement allegedly attributable to the defendant. The substance of that statement, given to the police, was that Riddle cocked the hammer and pulled the trigger, intending only to scare the neighbor.[40] In the dissent, written by Justice Douglas and joined therein by Justice Brennan, it is asserted that this latter statement was, in essence, a direct admission of the very point at issue. Further, the disclosure of the statement to the jury, although offered for the mere purpose of undermining the defendant's credibility, "was certain to have a prejudicial, if not conclusive, effect on the jury,"[41] the same point made in the Harris dissent.[42] It is clear that the Riddle dissenters now saw as a reality that which was presaged in Harris. Any incentive that law enforcement authorities might have had to safeguard an accused's Fifth Amendment rights by compliance with the dictates of Miranda[43] evaporates with

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[40] 404 U.S. at 974.

[41] 404 U.S. at 974-975.

[42] 401 U.S. 222, 229 n. 2 (1971).

[43] Miranda v. Arizona, 384 U.S. 436 (1966).

the knowledge of police interrogators that they may take calculated risks in light of Harris and that any statement they are able to extract from a subject in custody will be available for use against him if he elects to testify at trial.[44] To allow such a practice, in the view of Justice Douglas, would be to place undeserved credence in the trustworthiness of such utterances.[45]

A similar issue of trustworthiness was presented when Justices Douglas and Black dissented without opinion in Walder.[46] There the petitioner, like Harris, was convicted of selling narcotics to police agents. As the only defense witness the accused testified on direct examination that he had never sold or possessed illegal drugs. The same assertion was made in response to questions propounded during cross-examination. At this point, over defense objection, the accused was querried concerning narcotics which had been seized unlawfully from his home two years earlier. After the defendant reiterated denial of possession, the prosecution was allowed to prove the prior

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[44] 404 U.S. 974, 976 (1971).

[45] Id. at 497. This is the precise point which was overlooked by the majority in Harris. See note 26, supra and accompanying text.

[46] Walder v. United States, 347 U.S. 62 (1954).

possession through the testimony of two police witnesses.[47] The jury received a limiting instruction and the accused was convicted.

Writing for the seven-member majority Justice Frankfurter addressed the issue of whether or not the exclusionary rule embraced situations such as the one presented where illegally obtained evidence was utilized at trial for purposes other than the prosecution's case in chief. After reviewing the authorities which supported the rule[48] the majority recited the language which was seized upon by the Harris majority to the effect that, while the prosecution may be precluded from affirmative use of illegally obtained evidence, that same illegality should not be allowed to prevent contradiction of the accused who resorts to untruths in his trial testimony.[49] However, unlike the situation in Harris, here there was credible evidence from which the Court could conclude that the defendant's direct testimony was false. That evidence

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[47] Id. at 64. Unlike Harris the contradictory evidence was elicited from two police officers who testified concerning both the act and chemical analysis. See note 15 supra and accompanying text.

[48] 347 U.S. at 64-65.

[49] Id. at 65.

consisted of statements, which acknowledged possession, made by the accused in connection with a pretrial motion to suppress as evidence in the previous case the narcotics which had been seized unlawfully.[50] As sworn in-court testimony those statements rightly deserved a presumption of trustworthiness.[51] In that nothing was evident which would cast doubt upon this presumption the conclusion was inevitable that the accused's trial testimony was indeed perjured. Thus, while the trustworthiness of an accused's prior statements played a part in the Court's decisions in both Harris and Walder, such was demonstrated by the evidence in the latter while being merely assumed in the former.

In disposing of the problem presented in Walder the majority took pains to distinguish the prior case of Agnello v. United States.[52] There the accused was similarly convicted of offenses grounded in narcotics possession. Subsequent to the presentation of the prosecution's case the defendant testified in his own behalf wherein he made no reference to either the narcotics which were in-

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[50] Id. at 64 n. 1.

[51] Cf., Miranda v. Arizona, 384 U.S. 436, 461 (1966).

[52] 269 U.S. 20 (1925).

volved in the case or to any other matter dealing with narcotics. After receiving a negative response to an inquiry concerning whether or not the accused had ever seen narcotics before, the prosecution was allowed to introduce a can of cocaine which was the product of an illegal search and seizure. On appeal, the Court reversed the conviction stressing that in his testimony the accused did nothing more than to deny complicity, which he had every right to do, free from the prejudice of the tainted evidence.[53] Rather than hinge the decision in Walder on the quoted pronouncement of Justice Holmes in Silverthorne,[54] the majority opined that, since the accused chose to go beyond a mere denial of complicity in the crime with which he was charged and instead raised the issue of prior non-involvement concerning narcotics, he was thereby precluded from preventing the prosecution from utilizing the otherwise

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[53]The Court found that the defendant "did nothing to waive his constitutional protection or to justify cross-examination in respect of the evidence claimed to have been obtained by the search. As said in Silverthorne Lumber Co. v. United States . . . 'The essence of a provision permitting the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all.'" 269 U.S. at 35 (citation omitted).

[54]251 U.S. 385, 392 (1920).

inadmissible evidence to attack his credibility.[55] The fallacy of this position is not readily apparent. To lend support for his rationale Justice Frankfurter relies on language gleaned from a prior case[56] which on its face tends to bolster the proposition that by testifying regarding matters not limited to a denial of the elements of the case against him[57] the accused in Walder opened the door to a valid prosecutorial attack on his credibility. However, Michelson involved not the impeachment of an accused who had elected to testify but rather the impeachment of a character witness called by the accused for the purpose of establishing that the latter's reputation reflected a life and habit which were incompatible with the commission of the crime charged. In such a situation the underlying policy considerations are quite different in that constitu-

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[55] 347 U.S. at 65-66.

[56] Michelson v. United States, 335 U.S. 469 (1948), cited at 347 U.S. at 65 n. 3. Justice Frankfurter filed a concurring opinion in the case. See 335 U.S. at 487.

[57] "The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him." Michelson v. United States, 335 U.S. 469, 479 (1948).

tional provisions do not apply to the ordinary witness in the same sense that they apply to an accused.[58]

The decision in Walder has been criticized both on constitutional grounds and on the basis that it violates the rule which prohibits contradiction on a collateral matter.[59] Further, lower courts were not in the least loath to abandon its teachings especially where the line between direct and collateral matters was less than distinct.[60] Other courts shrank from the decision on the premise that the rule therein embodied was easier in the elucidation than in the application.[61] For some time after the decision in Miranda numerous courts had questioned the validity of Walder in light of the then new Supreme Court pronouncements.[62] While the decision in Harris would seem to re-

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[58] Cf., 2 Wright, Federal Practice and Procedure § 407, at 105 (1969).

[59] 1 Wigmore, Evidence § 15, at 76 (3d ed. Supp. 1972).

[60] See e.g., United States v. Birrel, 276 F. Supp. 798, 817 n. 23 (S.D.N.Y. 1967)(collecting cases).

[61] See e.g., United States v. Prebish, 292 F. Supp. 268 (S.D. Fla. 1968); State v. Brewton, 422 P.2d 581 (Ore. 1967), cert. denied, 387 U.S. 943 (1967).

[62] See e.g., Agius v. United States, 413 F.2d 915 (5th Cir. 1969); United States v. Fox, 403 F.2d 97 (2d Cir. 1968); Groshart v. United States, 392 F.2d 172 (9th Cir. 1968); Proctor v. United States, 404 F.2d 819 (D.C. Cir. 1968); Wheeler v. United States, 382 F.2d 998 (10th Cir. 1967);

vitalize Walder notwithstanding Miranda, inconsistencies mar the efficacy of the two former opinions. In Walder the evidence used for impeachment purposes was related to a different activity from that which formed the basis of the offense for which the accused was standing trial. The evidence which was similarly utilized in Harris related directly to the offense charged. Whereas in Walder the underlying physical evidence was obtained pursuant to an illegal search and seizure the testimonial evidence in Harris was produced by way of proscribed police custodial activity. Most importantly, however, the evidence used against the defendant in Walder had the paramount characteristic of presumptive trustworthiness which was patently absent in Harris in that the former was obtained during the course of a pretrial suppression motion. It was just such a proceeding which formed the factual basis for another case, which, although seemingly unrelated, requires scrutiny.

In Simmons v. United States[63] three defendants, including one Garrett, were tried for the crime of armed robbery. Prior to trial Garrett moved to suppress a suitcase which contained items implicating him in the commission of

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United States ex rel. Hill v. Pinto, 394 F.2d 470, 476 n. 14 (3d Cir. 1968)(collecting cases).

[63] 390 U.S. 377 (1968).

the offense charged. To meet the threshold requirement of standing to object to the use of the physical evidence the accused testified at the pretrial hearing that the suitcase was similar to one that he had owned and that some of the items found therein belonged to him. The suppression motion was denied and Garrett's testimony was ultimately admitted for use against him during the prosecution's case in chief.

The issue of standing was basic to the problem faced by the Court in this case. Writing for the six-member majority, Justice Harlan reviewed the prior judicially announced requirements which an accused must meet in this regard, those being that he was either the owner or possessor of the property illegally seized or that he had a possessory interest in the premises which were the situs of the unlawful police activity.[64] Further, the majority opinion noted that these requirements had been altered so that an accused was relieved of the responsibility to establish standing where the evidence unlawfully seized was an essential element of the crime charged or where the defendant was lawfully on the searched premises at the time

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[64] Id. at 389-390.

when the search took place[65]; in such cases the government was to be affirmatively precluded from asserting that the accused lacked the standing requisite to challenge the use against him at trial of the evidence thus unlawfully secured. As respects cases falling squarely within these parameters an accused would be relieved of the necessity of having to testify at any pretrial suppression hearing, thereby risking that his testimony could be used against him later at trial. This was necessitated by what the Court had viewed as an intolerable dilemma which severely limited an accused's ability to defend himself, especially in cases which involved possessory offenses, in that the very testimony needed to establish standing would also prove an element of the offense.[66] However, the situation in the instant case did not come within the relatively narrow scope of the Jones decision. Here Garrett was neither present when the physical evidence was seized nor was he invested with a possessory interest in the premises. Since the evidence seized was not an essential element of the robbery charge the accused was denied presumptive standing. In such a position the defendant was forced to establish affirmatively the requisite

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[65] Id. at 390 citing Jones v. United States, 362 U.S. 257 (1960).

[66] 390 U.S. 377, 391 (1968).

standing or suffer the consequences that the illegally obtained evidence would be used against him at trial, a reality acknowledged but not precluded by the Jones decision.[67]

At the core of the accused's dilemma are not only the nature of the evidence seized but, more importantly, the nature of the crime charged. In Simmons had the accused been tried for the crime of receiving or concealing stolen property the contents of the suitcase would have been an essential element of the crime and the accused would not have been forced into the situation in which Garrett found himself. The real distinction to be addressed therefore is that between possessory and non-possessory crimes, an issue which was not highlighted by the respective Courts in either Harris or Walder but which required consideration by the Court in Simmons,[68] although merely in passing. There the Court went on to fashion a rule which, although probably intended to supplement the rule announced in Jones, is patently more sweeping in its application.[69] The rationale

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[67]362 U.S. 257, 262 (1960).

[68]390 U.S. 377, 391-392 (1968).

[69]"We therefore hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be ad-

which underlies the formulation of this new rule is that an accused should not have to suffer the "undeniable tension" of having to choose between protections afforded by two different constitutional provisions.[70] Such a situation was viewed to transcend that presented where the accused gives up a mere benefit to secure the protection afforded him by the Constitution,[71] the implication being that this was a blatant form of coercion, especially in view of the fact that the testimony of the accused at the hearing on the suppression motion will be usually foreclosed from trial use only where the motion is granted.[72] Such coercion, which collaterally serves to undermine the purposes sought to be served by the exclusionary rule, tends to vitiate the voluntariness of the accused's statements.[73]

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mitted against him at trial on the issue of guilt unless he makes no objection." Id. at 394.

[70] Id. at 393-394.

[71] Id. at 394. Although not relied on by the Court, the reference to language in Garrity v. New Jersey, 385 U. S. 493, 496, 498 (1967) is obvious.

[72] 390 U.S. 377, 392-393 (1968).

[73] The Court was careful to point out that in those jurisdictions where the testimony is allowed to be utilized at trial after the pretrial motion has failed the underlying rationale is that of voluntariness; if the motion succeeds

The trustworthiness of the statements attributable to the accused in Simmons, although not mentioned by the majority opinion, did not escape the consideration of the dissenters. Both Justices Black and White contended that the accused's statements were presumptively truthful due to the circumstances under which they were given and since they were also highly probative and relevant, as well as voluntary, they should not be excluded with the attendant ramifications of deterring police activity.[74] However, to place this significant reliance upon the element of trustworthiness in such a situation is to disregard the realities of the trial arena and the abuses present even there. A ready example is the case of United States v. Harrison[75] where the defendant was being tried for the interstate transportation of stolen money orders. He testified during the pretrial suppression hearing in an effort to preclude the use at trial of a confession given during custodial

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the testimony is no less voluntary, but is considered to be the "fruit" of the underlying illegality. Id. at 392. Justice Black, dissenting in part, concedes the involuntariness of such statements but asserts that they are admissible on the theory that the privilege against self-incrimination had been waived irrespective of the choice involved. Id. at 397-398.

[74] Id. at 398-399.

[75] 461 F.2d 1127 (5th Cir. 1972), cert. denied, 409 U.S. 884 (1972).

interrogation, specifically alleging that the confession was involuntary because the interrogating agents threatened to investigate and prosecute his ill sister if he did not confess. During the course of cross-examination, the accused was asked if the confession was true. Despite defense objection the defendant was ordered by the judge to answer the prosecutor's question or face the alternative of either a citation for contempt of court or denial of the motion. In the throes of this dilemma the defendant answered that the confession was true. On appeal following conviction petitioner's primary contention was that the judge's action violated Harrison's privilege against self-incrimination. In disposing of the case the appellate court quoted Simmons for authority and distinguished it on the ground that, whereas there the accused was forced to choose between his Fourth Amendment privilege as respected the use of illegally seized physical evidence and his Fifth Amendment privilege against self-incrimination, in the instant case the accused was compelled to choose between two facets of the Fifth Amendment privilege: dismissal of his motion to suppress the confession and the possibility that his admission would later be used against him.[76] The court's opinion was that,

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[76] Id. at 1131-1132.

while it did not believe that such a practice as was indulged in by the trial judge was "good practice," subsequent action "in light of Simmons, adequately protected Harrison's Fifth Amendment rights by not allowing the testimony to be admitted against Harrison at trial."[77] As there was nothing to indicate from the record of trial that Harrison's judicial admission was used against him, either during the prosecution's case in chief or during petitioner's cross-examination at trial, the appellate court dismissed Harrison's assertion, based on Harris, that he could be impeached with the judicial admission, as not being properly before it.[78]

The lesson of Harrison should be clear. There, as in Walder and Simmons, the accused's utterances were presumptively trustworthy due to the circumstances under which they were made. Unlike Walder and Simmons the underlying "evidence" was the product not of an alleged illegal search and seizure but of an alleged unlawful custodial interrogation. If the yardstick by which such cases are measured continues to be trustworthiness, there is nothing to prevent an endless succession of cases like Harrison where

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[77] Id. at 1132 (footnote omitted).

[78] Id.

illegal police action, augmented by a prosecution-oriented judiciary, operates to destroy carefully nurtured constitutional protections.

The danger, however, is not confined to cases where the illegality which is sought to be challenged stems from custodial interrogation. An accused who would seek to suppress evidence obtained by illegal search and seizure is equally vulnerable. The protection allegedly offered by the decision in Simmons, specifically directed at such a situation,[79] is of doubtful vitality.[80] Thus an accused charged with a non-possessory offense might be forced to face the same dilemma as that confronted by the defendant in Harrison.[81] Similarly, the emasculation of Miranda by Harris does much to remove the protection afforded by cases which have heretofore applied the former's rule to Walder

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[79] 390 U.S. 377, 394 (1968).

[80] Although the Court had no occasion to question the soundness of Simmons in a case decided three months after Harris, it did specifically regard the former's underlying "tension" rationale as being open to question. See McGautha v. California, 402 U.S. 183, 212 (1971).

[81] Presumably those charged with possessory offenses would still be protected. See Jones v. United States, 362 U.S. 257 (1960).

situations[82] thus exposing defendants to risks previously avoided.

The decision in Harris poses additional problems which also reflect the possibility that an accused's privilege against self-incrimination may be meaningless in the face of police and prosecutorial practice. The holding in Harris does not appear to go beyond situations where the utterances of the accused are both trustworthy and neither involuntary nor coerced.[83] Rejecting, as they implicitly do, the proposition that custodial interrogation is per se coercive, the majority in Harris leaves open the question of whether or not statements obtained from the accused by way of fraud, artifice, or deception[84] could be utilized to attack the testimony of the accused at trial.[85] Thus

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[82] See e.g., Proctor v. United States, 404 F.2d 819 (D.C. Cir. 1968).

[83] See note 26 supra and accompanying text.

[84] In Rogers v. Richmond, 365 U.S. 534 (1961), Justice Frankfurter's majority opinion addressed the issue raised by the admission into evidence at a trial for murder of the confession of an accused which had been obtained by police interrogators after telling the accused that if he did not confess they would arrest his invalid wife and interrogate her. The standard adopted by the Court was "whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist . . . ." Id. at 544.

[85] While Rogers rejects the use of such statements,

today any accused faced with a situation akin to that of the accused in Rogers may well choose to give up his right to present trial testimony after giving consideration to the possibility that he may be confronted with his prior admission or confession--hardly a situation which comports with the principle of one being able "to speak in the unfettered exercise of his own will."[86] In somewhat the same vein an accused who has made a statement, otherwise inadmissible in the prosecution's case in chief, in testifying in his own behalf may limit his direct testimony to facts not contained in the prior statement. Here the accused's dilemma turns on the scope of cross-examination permitted in the trial jurisdiction[87] since this will determine whether or not the prosecutor will be able to accomplish indirectly that which he is prevented from accomplishing directly.[88] So too, an accused who indicates, in answering a question posed on cross-examination, that he does not remember may find that the prosecutor will resort to an at-

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the facts upon which the decision rests confines the prohibition only to the prosecution's case in chief. Id. at 541.

[86] Malloy v. Hogan, 378 U.S. 1, 8 (1964).

[87] See notes 96-97 infra and accompanying text.

[88] See e.g., Agnello v. United States, 269 U.S. 20 (1925).

tempted utilization of the illegally obtained statement in an effort to refresh his recollection[89] thereby making the statement's contents available for jury scrutiny.

Investigation of the various uniform and model codes and rules of evidence reveals that, with limited exception, they do not attempt to resolve the problems posed by the Harris-Simmons-Walder trilogy in a definitive manner. Without exception they adhere to the position adopted by the majority of jurisdictions, in derogation of the common law,[90] that an accused is a competent witness in his own behalf.[91] Similarly they acknowledge that an accused has a privilege

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[89] See e.g., Inge v. United States, 356 F.2d 345 (D.C. Cir. 1966).

[90] See note 16 supra.

[91] The applicable provisions provide that all persons are qualified as witnesses unless they are either incapable of either being understood or incapable of understanding the duty to tell the truth. Model Code of Evidence rule 9(a) (1942); id. rule 101 (1942); Uniform Rules of Evidence rule 7 (1953); id. rule 17 (1953). The effect was to remove existing disabilities thereby demonstrating a preference for relevant evidence. Model Code of Evidence rule 9, Comment (1942); Uniform Rules of Evidence rule 7, Commissioner's Note (1953). Both the Model Code and the Uniform Rules leave the narrow grounds of disqualification to be determined by the trial judge. Model Code of Evidence rule 101, Comment (1942); Uniform Rules of Evidence rule 17, Commissioner's Note (1953). The Federal Rules of Evidence express a broad grant of competency without the above limitations. Federal Rules of Evidence, rule 601 (1972).

not to be called as a witness and a privilege not to testify.[92] While an accused does have the right to testify in his own behalf he may, for a variety of reasons, decide against such an action. Under the older rules refusal to testify placed the accused at the extreme disadvantage of having both the prosecutor and the trial judge able to comment on his failure to take the witness stand as well as being subjected to a jury instruction which would allow the trier of fact to draw all reasonable inferences from his inaction[93]; however, the Federal Rules of Evidence would absolutely prohibit such practices.[94] Thus under the Federal Rules an accused who elects not to testify, fearful of the

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[92]Model Code of Evidence rule 201(1)(1942); Uniform Rules of Evidence rule 23 (1953). The Federal Rules of Evidence do not provide an express prohibition, most probably reflecting an implicit recognition of the Fifth Amendment proscription.

[93]Model Code of Evidence rule 201(3) (1942); Uniform Rules of Evidence rule 23(4) (1953). Admittedly a minority position, the provisions of the Model Code are predicated on a desire not to impede the evolution or development of legal doctrine pursuant to pressure for reform in this regard. Model Code of Evidence rule 201(3), Comment (1942). While the Uniform Rules specify only comment by counsel, comment by the judge is strongly inferred. Uniform Rules of Evidence rule 23(4), Commissioner's Note (1953).

[94]Federal Rules of Evidence rule 513(a) (1972). The basis of the rule lies in recognition of the decision in Griffin v. California, 380 U.S. 609 (1965).

use against him of illegally obtained evidence, is in a superior position to that which he would have occupied under both the Uniform Rules and the Model Code.[95] Under all three formulations an accused who testifies on the merits will be subjected to the orthodox rule which permits an unlimited scope of cross-examination and while the older rules retain the privilege against self-incrimination as to facts which merely affect credibility,[96] the Federal Rules reject this proposition.[97] Therefore, at least under these latter rules, an accused will be unable to prevent a prosecutor from utilizing the illegally obtained evidence, either after a line of questioning designed to elicit an inconsistency[98] or subsequent to the witness's indication that he does not remember the incident in question.[99] Although the Federal Rules and the Model Code are silent on the

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[95]The accused, if he desires to do so, may request and is entitled to an instruction which would direct the jury not to draw any adverse inference from his failure to testify. Federal Rules of Evidence rule 513(b) (1972).

[96]Model Code of Evidence rule 105 (1942); id. rule 208, Comment (1942); Uniform Rules of Evidence rule 25(g), Commissioner's Note (1953).

[97]Federal Rules of Evidence rule 611(b) (1972).

[98]See note 88 supra.

[99]See note 89 supra and accompanying text.

subject, at least under the Uniform Rules an accused who is free from the use against him in the prosecution's case in chief of any statement made by him which was the product of fraud, artific, or deception[100] is similarly protected from such use upon his cross-examination.[101] Only the Model Code and Federal Rules provisions indicate that an accused who testifies at a hearing on a pretrial motion does not relinquish his privilege against self-incrimination.[102] Thus an accused being tried for a non-possessory offense who wishes to contest the use of allegedly illegally obtained physical evidence or any accused seeking to challenge an allegedly unlawfully obtained admission or confession may do so without exposing himself to cross-examination generally. He does so at his peril, however, in that none of the formulations affirmatively preclude the use of such statements against him at a later point in trial.[103]

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[100] See notes 84-85 supra and accompanying text.

[101] Uniform Rules of Evidence rule 63(6)(1953). Model Code of Evidence rule 505 (1942) is narrower in scope and its application to a situation such as this is doubtful.

[102] Model Code of Evidence rule 208, Comment (1942); Federal Rules of Evidence rule 104(d) (1972).

[103] The Federal Rules are not addressed to this problem, the drafters conceding that the law in the area is uncertain. Federal Rules of Evidence rule 104(d), Advisory Committee's Note (1972) citing Walder v. United States, Simmons v. United States, and Harris v. New York (citations omitted).

CHAPTER III.

STATEMENTS COMPELLED BY GRAND JURIES, ADMINISTRATIVE AGENCIES, AND LEGISLATIVE COMMITTEES

The fact that an individual may be compelled by illegal policy activity to utter statements which are incriminating and which may thereafter be used against him does not place such an individual in a particularly unique position. Other arms of the executive branch of the government, as well as entities within the legislative and judicial branches, may accomplish the same thing by way of procedures which have been given full legal approval. As early as 1807 it was recognized that the country has the right to the testimony of every citizen but that such right is limited by the countervailing privilege of the witness not to accuse himself.[104] Since that time that privilege has been extended so as to apply to grand jury proceedings and investigations conducted by administrative

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[104] United States v. Burr, F. Cas. 1469e (C.C.Va. 1807).

agencies and legislative committees.[105] However, the privilege may well be abrogated by the granting of immunity[106] and the recalcitrant witness subjects himself to possible civil and criminal contempt citations and associated penalties for his refusal to testify subsequent to such a grant.[107] Further, once an order is issued for the immunity grant to take effect the witness is affirmatively prevented from seeking judicial review of this decision since the order is considered not to be final and thus nonappealable.[108] Such principles apply to witnesses appearing before both federal and state investigating bodies and the extent of the nullification of the Fifth Amendment privilege depends upon the respectively applicable legislation. It is to the first of these that attention is now directed.

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[105] See generally 8 Wigmore, Evidence § 2252, at 325-326 (McNaughton rev. 1961); 58 Am. Jur., Witnesses § 46 (1948); 98 C.J.S., Witnesses § 433 (1957); 38 C.J.S., Grand Juries, § 42 (1957).

[106] See generally 58 Am. Jur., Witnesses § 86 (1948); 98 C.J.S., Witnesses § 439 (1957). See also note 1 supra and accompanying text.

[107] See e.g., 38 C.J.S., Grand Juries § 41 (1957).

[108] Cobbledick v. United States, 309 U.S. 323 (1940); In re Grand Jury Investigation, 427 F.2d 714 (3d Cir. 1970).

Recently Congress enacted broad legislation dealing with witness immunity.[109] Clearly it is a departure from other legislation previously enacted into law which dealt with the subject of immunity and its provisions repealed the authorization of immunity grants contained in over half a hundred other federal statutes.[110] It is sweeping in application, by its terms encompassing proceedings before courts, as well as executive and legislative entities.[111] Such legislative agencies include either House of Congress and any committee, subcommittee, or joint committee thereof.[112] Grand Juries are included, as are ancillary proceedings before federal courts.[113] Witnesses before such bodies are subject to having not only their testimony extracted but their books, documents, records, recordings, and other material as well.[114] The evidence thus compelled may not be withheld without penalty by the witness who asserts his

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[109] 18 U.S.C. §§ 6001-05 (1970); Act of Oct. 15, 1970, Pub. L. No. 91-452, 84 Stat. 926.

[110] See U.S. Code Congressional and Administrative News, 91st Cong., 2d Sess. (1970) at 4019.

[111] 18 U.S.C. § 6001 (1970).

[112] 18 U.S.C. § 6005(a) (1970).

[113] 18 U.S.C. § 6003(a) (1970).

[114] 18 U.S.C. § 6001(2) (1970).

privilege against self-incrimination[115]; the witness who complies has exchanged his evidence for the assurance that neither such evidence nor any information derived either directly or indirectly from that evidence may be used against him in any criminal case.[116]

This immunity may be granted in a variety of ways depending upon the proceedings involved. Where the witness appears before a legislative body, after such witness has refused to comply on the basis of the privilege against self-incrimination,[117] immunity flows from the order of the appropriate federal district court[118] subject to a request

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[115] 18 U.S.C. § 6002 (1970). If the witness does not comply he is subject to the sanction of both civil contempt, for which the penalty may not exceed imprisonment for eighteen months, 28 U.S.C. § 1826(a)(1970), and for criminal contempt which will trigger a sentence which is within the discretion of the sentencing judge. 18 U.S.C. § 401(3)(1970).

[116] 18 U.S.C. § 6002 (1970). The protection thus formulated is hereinafter referred to as use and derivative use immunity.

[117] 18 U.S.C. § 6005(a)(1970). In such cases the immunity grant hinges on the claim of the witness' privilege. Such requirement is similar to that found in numerous statutes repealed by the current statute. See e.g., 49 U.S.C. § 43(1970); 47 U.S.C. § 409(1970).

[118] At first blush this requirement, that the foundation of the grant of immunity, reposing in the judiciary, would seem to eliminate any necessity for judicial review. See note 108 supra and accompanying text. However, use of the word "shall" in the statute forecloses any possibility of judicial discretion.

from a duly authorized representative of such body, subsequent to preliminary requirements.[119] Where proceedings before a court or grand jury are involved the immunity grant is similarly extended by the federal judiciary subsequent to a request by a United States Attorney.[120] All that is required is that this attorney be of the opinion that the evidence sought to be obtained is necessary to the public interest and that the witness either has refused or is likely to refuse to comply based on his privilege against self-incrimination.[121] Any administrative agency with the approval of the Attorney General, may itself issue

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[119]Where the proceeding involves either House of Congress, such a request must be predicated upon a majority vote of the members present; proceedings before a committee, subcommittee, or joint committee require a two-thirds vote of the membership; in all cases the Attorney General must be served with a notice of intention ten days or more prior to the date of the request.

[120]18 U.S.C. § 6003(a)(1970). A request of this type must be approved by the Attorney General, Deputy Attorney General, or a designated Assistant Attorney General. 18 U.S.C. § 6003(b) (1970).

[121]18 U.S.C. § 6003(b)(1)-(2)(1970). In such cases the immunity grant does not necessarily depend upon the witness' claim of privilege and thus is somewhat automatic and therefore similar to the operation of several statutes repealed by the existing statute. See e.g., 15 U.S.C. § 49 (1970); 29 U.S.C. § 209 (1970).

the immunity grant provided these latter two requirements have been met.[122]

Without question the use and derivative use immunity available under the terms of the present federal statute is broader than the protection afforded by a prior enactment which formed the basis for the first successful challenge of immunity grants as being unconstitutional. In Counselman v. Hitchcock[123] the Supreme Court faced the issue of whether or not Congress, via statute,[124] could validly compel a witness appearing before a federal grand jury to testify, notwithstanding the witness' reliance upon the privilege against self-incrimination, by tendering immunity.[125] Here the federal grand jury was investigating

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[122] 18 U.S.C. § 6004 (1970). No indication appears of legislative intent for the provision which precludes action by the judiciary in this particular instance other than the anticipation that the Attorney General will insure that "appropriate procedures" are followed by each agency. See U.S. Code Congressional and Administrative News, 91st Cong., 2d Sess. (1970) at 4018. This portion of the statute is also of the claim-automatic type. See note 121 supra.

[123] 142 U.S. 547 (1892).

[124] Act of Feb. 4, 1887, ch. 104, § 12, 24 Stat. 379 (1887), as amended Act of March 2, 1889, ch. 382, § 2, 25 Stat. 857 (1889).

[125] The Act, as amended, provided that any evidence so obtained would not be used against the witness in any criminal proceeding or for the enforcement of any penalty

certain alleged violations of federal regulations by various railroad companies. After appearing pursuant to a duly served subpoena the witness was sworn and testified in response to certain questions relating to the grand jury's mandated inquiry. However, he declined to answer other questions on the grounds that to do so would be to incriminate himself. A second similar refusal followed a judicial directive requiring compliance whereupon the witness was adjudged to be in contempt and ordered incarcerated until such time as he answered the grand jury's questions. The case found its way to the Supreme Court after denial of a request for a writ of habeas corpus.[126]

The Court initially noted that since the grand jury's investigation involved alleged violations of a federal statute the matter was indeed a criminal one and that the Fifth Amendment proscription applied.[127] This

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or forfeiture except perjury committed while acting as a witness. 142 U.S. 547, 560-561 (1892). The Protection thus formulated is hereinafter referred to as use immunity.

[126]It should be noted that here judicial review was available in that the witness refused to testify, a situation quite different from that where the witness seeks judicial review after responding to the subpoena but before refusing to testify. See note 108 supra and accompanying text.

[127]142 U.S. 547, 562 (1892).

being so, the privilege embodied in the Amendment was "as broad as the mischief against which it seeks to guard."[128] To supplant the privilege lawfully the statutory immunity had to be coextensive with it.[129] Turning to the wording of the statute the Court observed that while the witness' evidence could not be subsequently used against him, unprevented was the use of such evidence to search out and uncover other evidence and witnesses which could be so utilized and which would not have been available but for such witness' compliance[130]; in short the statute did not specifically grant derivative use immunity nor did it absolutely preclude future prosecution of the witness for offenses linked to the events to which his testimony related.[131] After reviewing the numerous state court decisions that interpreted state statutes which sought to impinge upon state constitutional provisions embodying similar self-incrimination clauses, the Court unequivocally rejected those cases which deemed use and derivative use immunity

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[128] Id. at 563.

[129] Id. at 564-565; id. at 585.

[130] Id. at 564; id. at 586.

[131] This type of immunity is hereinafter referred to as transactional immunity.

as being a valid substitute for the privilege.[132] Instead, it was announced that "a statutory enactment, to be valid, must afford absolute immunity for the offense to which the question relates."[133] Only in this way, reasoned the Court, could a statute supply that quantum of protection which would adequately guard the witness against the entire spectrum of evils which the privilege was designed to prevent.[134] Thus, in a unanimous opinion, not only was the witness' contempt conviction reversed but a precedent was born.

Deferring to the Counselman decision Congress again legislated with the intent to formulate an immunity standard which, when applied, could lawfully force witnesses to answer incriminating questions. The new statute[135] was subjected to scrutiny by the Supreme Court in the case of Brown v. Walker.[136] The facts here were identical with those in Counselman except that a different grand jury jurisdiction was involved and the witness in Brown refused, on the grounds of self-incrimination, to answer any substantive

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[132] 142 U.S. 547, 586 (1892).

[133] Id., citing Boyd v. United States, 116 U.S. 616 (1886).

[134] 142 U.S. 547, 585-586 (1892).

[135] Act of Feb. 11, 1893, 27 Stat. at L. 443 (1893).

[136] 161 U.S. 591 (1896).

questions at all. Like its predecessor, the Brown decision involved a determination of whether or not the statutory provisions which embraced transactional immunity[137] were sufficient to displace the Fifth Amendment's prohibition. The five-man majority, relying primarily on the prior decision in Counselman,[138] upheld the validity of the statute and therefore the transactional immunity standard.[139] The four-man minority contended to no avail that the language of the Fifth Amendment was incapable of being diluted in any measure by a mere act of Congress.[140] Although neither use nor derivative use immunity was alluded to by the three opinions in Brown it is beyond question that either and both were rejected by all nine justices.

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[137]The statute provided in pertinent part that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise." Id. at 594. The immunity thus embodied was automatic in that the witness could not refuse to attend and testify or produce evidence, and, once he did, immunity flowed as a natural consequence. Id.

[138]161 U.S. 591, 594-595 (1896). Here the Brown majority inferred that immunity from prosecution was sufficient to cancel out the privilege.

[139]161 U.S. 591, 610 (1896).

[140]Id. at 610; id. at 630.

Transactional immunity, thus judicially endorsed, subsequently became the underlying standard for use in state enactments aimed at prying loose testimony and other evidence from unwilling witnesses. In the wake of the Brown decision innumerable multitudes of state immunity statutes were spawned which mimicked to the point of punctuation the language of the statute there upheld and which survive today either as originally enacted or as venerable descendants. Fifteen such statutes relate to grand jury investigations of any type.[141] While the majority of these requires that the witness first claim his privilege against self-incrimination, three states provide automatic immunity.[142] Two states limit the immunity grant where the grand jury is

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[141] Ariz. Rev. Stat. Ann. § 13-1804 (Supp. 1972-1973); Colo. Rev. Stat. Ann. § 154-1-18 (Supp. 1972); Del. Code Ann. § 11-3508 (Supp. 1970); Fla. Stat. Ann. § 914.04 (1972); Idaho Code Ann. § 19-1115 (Supp. 1973); Kan. Stat. Ann. § 22-3102 (Supp. 1972); Minn. Stat. Ann. § 3.14 (Supp. 1973); N.H. Rev. Stat. Ann. § 516:34 (Supp. 1972); N.Y. Crim. Pro. L. § 190.40 (McKinney 1971); N.D. Cent. Code Ann. § 31-01-09 (Supp. 1973); Ore. Rev. Stat. Ann. §§ 139.190, 139.200 (1971); Utah Code Ann. § 54-7-4 (Supp. 1973); Vt. Stat. Ann. tit. 12, § 1664(a)(Supp. 1973); Wash. Rev. Code Ann. § 10.27.130 (Supp. 1972); Wis. Stat. Ann. § 972.08 (1971).

[142] Kan. Stat. Ann. § 22-3102 (Supp. 1972); N.Y. Crim. Pro. L. § 190.40 (McKinney 1971); Vt. Stat. Ann. tit. 12, § 1664(a)(Supp. 1973).

investigating matters which relate to alcoholic beverages[143]; two other states only provide for the grant of immunity where the subject of the grand jury's investigation is either organized crime or racketeering.[144] Statutes in two other states not only provide for transactional immunity but also affirmatively state that such will be an absolute bar to prosecution.[145] One state bars indictment as the price paid by the state for the witness' testimony.[146] Three states, while allowing the court which exercises authority over the grand jury to grant immunity to witnesses, fails to specify the nature of such immunity.[147] Only two states provide for use and derivative use immunity for grand jury

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[143]Ala. Recomp. Code Ann. tit. 29, §§ 110, 111 (1958); Iowa Code Ann. § 622.15(4)(1950)(here another immunity statute has been incorporated by case law. See Koonck v. Cooney, 244 Ia. 153, 55 N.W. 2d 269 (1952). Statutes in both states provide automatic immunity.)

[144]Cal. Pen. Code Ann. § 1324 (Deering 1971); Pa. Stat. Ann. tit. 19, § 640.1 (Supp. 1973-1974). Under both laws the witness must claim his privilege.

[145]Ill. Stat. Ann. ch. 38, §§ 106-1 to 2 (1970); Nev. Rev. Stat. Ann. §§ 178.572, .574 (1967).

[146]Tenn. Code Ann. § 40-1623 (1955).

[147]Ark. Stat. Ann. § 43-916 (1964); Ohio Rev. Stat. Ann. § 2939.17 (Supp. 1971); Mich. Comp. L. Ann. § 767.19a (Supp. 1973-1974).

witnesses.[148] All these statutes, save five, provide that a cooperating witness may be punished for perjury or false swearing.[149]

State statutes have also provided for the granting of immunity where the witness testifies before the state legislature or an associated committee or subcommittee. However, in such cases the use of transactional immunity is not so prevalent. Of the twenty-one states which provide for any type of immunity in such cases only eleven grant transactional immunity; in seven of these jurisdictions the grant operates automatically[150] while in the remainder the witness must first claim his privilege.[151]

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[148]La. Rev. Code Crim. Pro. art. 439.1C (Supp. 1973); New Jersey occupies a curious position in that it grants use and derivative use immunity to public employees who testify, N.J. Stat. Ann. § 2A:81-17.2a2 (Supp. 1973-1974), while other witnesses receive only use immunity. N.J.Stat. Ann. § 2A:81-17.3 (Supp. 1973-1974).

[149]Ark. Stat. Ann. § 43-916 (1964); Kan Stat. Ann. § 22-3102 (Supp. 1972); Mich. Comp. L. Ann. § 767.19a (Supp. 1973-1974); Pa. Stat. Ann. tit. 19, § 640.1 (Supp. 1973-1974); Tenn. Code Ann. § 40-1623 (1955).

[150]Ariz. Rev. Stat. Ann. § 41-1152 (1956); Cal. Gov't. Code Ann. § 9410 (Deering 1973); Iowa Code Ann. § 622.16 (1950); Mass. Gen. L. Ann., ch. 3, § 28 (1966); Minn. Stat. Ann. § 3.14(3) (Supp. 1973); Mont. Rev. Code Ann. § 43-405 (1947); Ohio Rev. Code Ann. § 101.44 (1969). Ohio denies the immunity to anyone who requests, in writing, to appear and testify.

[151]Alaska Stat. Ann. § 24.25.070 (1972); N.Y. Crim. Pro. L. §§ 50.10, .20 (McKinney 1971); Tenn. Code Ann. § 3-319

Four states grant automatic use immunity for the compelled testimony or other evidence.[152] Automatic use and derivative use immunity is provided for testimony and other evidence by two states,[153] while two other states limit such immunity grants to testimony only.[154] Two additional states, while providing that witnesses do not have the right to refuse giving testimony or evidence to the state legislature or its committees or subcommittees, fail to specify the nature of the immunity provided.[155]

By far the largest number of state statutory immunity grants have been directed at witnesses appearing before hearings conducted by administrative agencies.[156]

(1955); Tex. Rev. Civ. Stat. Ann. art. 5429f, § 13 (Supp. 1972-1973).

[152]Idaho Code Ann. § 67-411 (1973); Ill. Stat. Ann. ch. 63, § 6 (Supp. 1973-1974); W. Va. Code Ann. § 4-1-5a (1966); Wis. Stat. Ann. § 13.35 (1972).

[153]Kan. Stat. Ann. § 46-109 (1964); N.J. Stat. Ann. § 52:13-3 (1970).

[154]Okla. Stat. Ann. tit. 12, § 411 (1960); Ore. Rev. Stat. Ann. § 171.525 (1971-1972).

[155]Ala. Recomp. Code Ann. tit. 7 § 455 (1958); Conn. Gen. Stat. Ann. § 2-47 (1969).

[156]Literally thousands of these statutes have been enacted and thus no attempt will be made to include them all in this work. The statutes which are hereinafter delineated are considered by the writer te be fairly representa-

Fourteen states have provided for transactional immunity where the witness testifies or produces evidence during an investigation conducted by the state's public utility commission. Of these only three require that the privilege be claimed by the witness for the immunity to become effective[157]; the remainder provide for automatic immunity.[158] Similar commissions in two other states have been given the power to grant only use immunity.[159] Nine states have conferred the power to grant witness immunity to their respective employment security commissions, all such being transactional immunity predicated upon the witness' claim of privilege.[160] The securities regulation commissions of

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tive of the overall individual state approach to the immunity problem within the sphere of administrative agency operations.

[157]N.Y. Pub. Serv. L. § 20(2) (McKinney Supp. 1973-1974); Pa. Stat. Ann. tit. 66, 1402 (1959); R.I. Gen. L. Ann. § 28-42-54 (1956).

[158]Ala. Recomp. Code Ann. tit. 48, § 67 (1958); Ariz. Rev. Stat. Ann. § 40-244 (1956); Ark. Stat. Ann. § 73-225 (1957); Cal. Pub. Util. Code Ann. § 1795 (Deering 1970); Del. Code Ann. § 187 (1953); Md. Code Ann. art. 78, § 81(c) (1969); Mo. Stat. Ann. § 386.470 (1949); Ohio Rev. Code Ann. § 4903.08 (1953); Utah Code Ann. § 54-7-4(3) (1953); Vt. Stat. Ann. tit. 12, § 1664(a) (Supp. 1973); Wyo. Stat. Ann. § 37-35 (1957).

[159]Fla. Stat. Ann. § 350.60 (1968)(automatic);Wash. Rev. Code Ann. § 80.04.050 (1962)(claim).

[160]Iowa Code Ann. § 96.11(10) (1972); Kan. Stat. Ann. § 44-714(i) (1964); Minn. Stat. Ann. § 268.12(10) (1959);

six states may grant transactional immunity and of these, three provide for automatic immunity[161] while the remaining three condition the immunity grant on the witness' initial claim of privilege.[162] Five other states have, via statute, given the power to grant transactional immunity to an alcoholic beverage commission, the majority of which require that the privilege be initially claimed by the witness.[163] The oil and gas conservation commissions of three states have similar transactional immunity powers, but only one of these states provides that the immunity is automatic.[164] Insurance commissions of three other states

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Miss. Code Ann. § 71-5-141 (1972); Neb. Rev. Stat. Ann. § 48-615 (1968); N.C. Gen. Stat. Ann. § 96-4(j) (1963); S.D. Comp. L. Ann. § 61-3-8 (1967); Tenn. Code Ann. § 50-1342 (1955); Va. Code Ann. § 60.1-43 (1950).

[161]Ind. Stat. Ann. tit. 23, art. 2, ch. 1, § 16 (Burn's 1972); Me. Rev. Stat. Ann. tit. 26, § 1082(10) (1964); Mont. Rev. Code Ann. § 15-2019(2)(b) (1947).

[162]La. Rev. Stat. Ann. 51§ 709C(4) (Supp. 1973); Okla. Stat. Ann. tit. 71, § 405 (1965); S.C. Code L. Ann. § 62-307 (1962).

[163]N.H. Rev. Stat. Ann. § 176:16 (1964); Ore. Rev. Stat. Ann. § 471.770 (1971-1972); W. Va. Code Ann. § 60-2-18 (1966). The privilege is automatic in the remaining two states. Ill. Stat. Ann. ch. 43 § 163d (Supp. 1973-1974); Wis. Stat. Ann. § 139.20 (Supp. 1973).

[164]N.M. Stat. Ann. § 65-3-7 (1953). The other two require that the witness claim his privilege. Colo. Rev. Stat. Ann. § 100-6-8 (1964); Nev. Rev. Stat. Ann. § 522.100 (1967).

have similar powers,[165] as do the industrial commissions of two other states.[166] Transactional immunity may also be granted by various administrative agencies of three additional states.[167] Apparently only one state has opted for use immunity grants where administrative agencies are concerned.[168]

These state immunity statutes have gained added significance in light of the more recent Supreme Court decisions which have addressed questions which dealt with the interrelationship between the proscription of the Fifth Amendment and the concept of immunity. In Malloy v. Hogan[169] the petitioner had been called to testify before a state investigatory body. Despite the fact that he was fully immune from prosecution in state court he refused to answer

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[165] Ky. Rev. Stat. Ann. § 304.2-350(1) (1973)(claim); Mich. Comp. L. Ann. § 500.2033 (1967)(automatic); Tex. Pen. Code Ann. art. 598 (1952)(automatic).

[166] Idaho Stat. Ann. § 72-1340 (1973)(automatic); N.D. Cent. Code Ann. § 38-08-12 (1972)(claim).

[167] Alaska Code Ann. § 06.05.020 (1962)(commerce commission; claim); Mass. Gen. L. Ann. c. 93, § 7 (1972)(trade commission; automatic); N.J. Stat. Ann. § 11:1-15 (1960)(civil service commission; automatic).

[168] Conn. Gen. Stat. Ann. § 12-2 (1972)(tax commission; automatic).

[169] 378 U.S. 1 (1964).

questions relating to gambling and other criminal activities, asserting that to answer would tend to incriminate him. Subsequent to a contempt judgment and the concomitant imposition of an indeterminate jail sentence the recalcitrant witness applied for a writ of habeas corpus. Denial of the application by the state's court of last resort paved the way for a determination by the Supreme Court. By a narrow majority the Court held that the Fifth Amendment's privilege against self-incrimination was guaranteed to state witnesses by way of the provisions contained in the Fourteenth Amendment. Here, while immunity per se was involved, a determination of the scope of that immunity was not necessary to the decision in the case. Nonetheless, the unfortunate seeds of precedent which were destined to displace completely the principle announced by the decision in Counselman[170] over sixty years before were inadvertently sown.

Writing for the five-man majority Justice Brennan placed heavy emphasis on the theretofore decided coerced confession cases[171] in an effort to justify the contention that the hallmark of this country's system of criminal jus-

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[170] Counselman v. Hitchcock, 142 U.S. 547 (1892).

[171] See e.g., 378 U.S. 1, 6 (1964); id. at 7-8.

tice was that it is accusatorial rather than inquisitorial,[172] and that therefore one should be protected against both state and federal invasions of the privilege and "to remain silent unless he chooses to speak in the unfettered exercise of his own will . . . ."[173] Going this far and no further would not have done violence to the Counselman holding; however, after it was determined that the federal privilege was applicable in state proceedings, the facts of the case demanded that the Court face the issue of whether or not the availability of the privilege was to be determined by different standards with respect to jurisdiction. These standards related to fear of prosecution, which, under cases involving federal prosecutions, meant that to invoke the privilege lawfully the witness had to have "reasonable cause to apprehend danger from a direct answer."[174] Further, whether or not this standard had been met depended upon the implications of the question put to the witness, the setting in which it was asked, and that a responsive answer or explanation might threaten to force

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[172] 378 U.S. 1, 7 (1964).

[173] Id. at 8.

[174] Hoffman v. United States, 341 U.S. 479, 486 (1951).

the witness into a disclosure which, as to him, would be injurious.[175] The majority in Malloy concluded that the standard should not differ between federal and state cases[176] and this in turn required a determination of whether or not the facts of the case at bar comported with the federal standard.

It was at this juncture that the Malloy majority fatally undercut Counselman. In order to show that the petitioner in Malloy stood in substantially the same position as the uncooperative witness in Hoffman when they both claimed the privilege, the majority asserted that the underlying facts and circumstances of the proceeding in question, to form a valid basis for the claim, had to demonstrate not only that the answers to the questions posed would themselves support a conviction but also that the answers "would furnish a link in the chain needed to prosecute . . . ."[177] That this proposition related to a predicate for the claim of the privilege and not to the scope of that same privilege as embracing use and derivative use immunity is evident from the facts of Hoffman. There the witness refused

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[175] Id. at 486-487.

[176] 378 U.S. 1, 11 (1964).

[177] Id. quoting Hoffman v. United States, 341 U.S. 479, 486 (1951).

to testify before a federal grand jury. The sole issue was whether or not the questions, if answered or commented upon, placed the witness in real and substantial danger of incrimination.[178] The Court, with one dissenter, rejected the contention that to claim the privilege the witness had to allege facts to show why he had refused to speak,[179] holding instead that such could well be determined by the judge through "his personal perception of the peculiarities of the case."[180] Not one word of the opinion in Hoffman is indicative of the fact that any member of the Court considered that the scope of immunity was anything other than that of the transactional immunity sanctioned by the full Court in Counselman. To the contrary, the entire thrust of the opinion in Hoffman was to enunciate a concern that the privilege would be abrogated since, if the witness was "required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee."[181]

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[178] 341 U.S. 479, 482 (1951).

[179] Id. at 484.

[180] Id. at 487.

[181] Id. at 486.

It was this same concern that motivated the majority opinion in Malloy.[182] Unquestioned was the scope of the immunity involved; the only real issue was whether or not the previously announced standards which would allow the witness validly to claim the privilege applied to state proceedings and whether or not these standards had been met. Of the four dissenters none rose to challenge the concept of transactional immunity. Rather they were preoccupied with other pursuits. Two of the Justices joined in an opinion which evidenced that their only concern was that the Fifth Amendment should not be applied to the states via the vehicle of the Fourteenth Amendment[183] and that the proper inquiry would have been whether the state proceedings comported with the concept of fundamental fairness under the Due Process clause of the latter Amendment.[184] By making the Fifth Amendment applicable to the states, they reasoned, the majority placed an unwarranted reliance upon the principle that both spheres within our federal

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[182] 378 U.S. 1, 11-12 (1964).

[183] Id. at 15 (Harlan and Clak, JJ., dissenting); id. at 21.

[184] Id. at 28-29.

system should be congruent[185] and from this could only come a dilution of state power and a dangerous corresponding shift in emphasis to federal power where primary responsibility for crime prevention was concerned.[186] The other two Justices, joining in yet another opinion in the case, were just as far away from the scope of immunity issue. They took the position that the majority had fashioned a rule which would allow any witness thereafter to invoke the privilege while leaving the judge in a position where he was powerless to do anything but accept the witness' claim.[187] They made it clear that in their opinion if investigating bodies were to continue to be free to extract necessary evidence from witnesses, while at the same time allowing the privilege to operate "as a protection against compelled incriminating answers, the trial judge must be permitted to make a meaningful determination of when answers tend to incriminate."[188] Patently, these jurists were concerned only that the "reasonable apprehension"

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[185] Id. at 27.

[186] Id. at 28.

[187] 378 U.S. 1, 33 (1964)(White and Stewart, JJ., dissenting).

[188] Id. at 34 (emphasis added).

standard should be tested by someone other than the witness[189] lest the privilege be transformed into a shield against "distasteful questions."[190]

The same day that Malloy was decided the Supreme Court handed down its decision in Murphy v. Waterfront Commission of New York.[191] The petitioners in Murphy had been granted transactional immunity by a bistate body which was investigating a work stoppage at various piers located in one of the states. Although the statutory immunity extended to both states within which the investigating agency exercised authority, the witnesses refused to answer certain questions contending that to do so would tend to incriminate them under federal law. The issue thus faced by the Court was whether a state could compel an immunized witness to give testimony which could later be utilized to convict him of a federal crime. However, the Court was quick to point out that this issue was not dependent upon which sovereign compelled the testimony or which sovereign used the testimony since the Fifth Amendment's prohibition respecting self-incrimination had that day been held fully

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[189] Id. at 34.

[190] Id. at 37.

[191] 378 U.S. 52 (1964).

applicable to the states.[192] Initially the Court noted that there were then in existence three judicially announced rules which had a direct bearing on the case at bar: (1) federal entities could compel a witness to give testimony which might incriminate him under state law,[193] (2) state entities could compel a witness to give testimony which might incriminate him under federal law,[194] and (3) state compelled evidence could be introduced into evidence in federal court.[195] The solution of the problem posed by the case at bar thus depended upon whether or not these precedents had been abrogated by the Malloy[196] decision.[197]

After a review of the applicable case law the Court concluded that the second of these precedents was established in a case which refused to hold that the Fifth Amend-

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[192] Id. at 53 n. 1.

[193] United States v. Murdock, 284 U.S. 141 (1931).

[194] Knapp v. Schweitzer, 357 U.S. 371 (1958).

[195] Feldman v. United States, 322 U.S. 487 (1944).

[196] Malloy v. Hogan, 378 U.S. 1 (1964).

[197] Murphy v. Waterfront Commission of New York, 378 U.S. 52, 57 (1964).

ment's privilege against self-incrimination was applicable to the states--a concept rejected by the present Court.[198] Equally infirm was the first precedent which the Court characterized as being grounded upon erroneous authority and faulty rationale.[199] The third precedent was also considered to be devoid of vitality in that the underlying rationale was predicated upon an analogous application of the rule formulated to deal with the illegal search and seizure cases to situations involving state grants of immunity.[200] In that the basic premise there was no longer valid the question previously decided was considered to be an open one.[201] Essential to the resolution of that problem

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[198] Id. at 76-77.

[199] Id. at 73.

[200] In Feldman v. United States, 322 U.S. 487 (1944), evidence compelled by a state grant of immunity was utilized to convict the former witness of a federal offense. Since the then existing law allowed evidence obtained by state agents, by methods which would have constituted illegal searches and seizures if conducted by federal officers, to be turned over to federal prosecutors for the latter's use, the Feldman majority reasoned that the same result should obtain where the evidence flows from an immunity grant. However, the "silver platter" doctrine respecting evidence obtained pursuant to illegal searches and seizures was subsequently expressly abandoned. See Elkins v. United States, 364 U.S. 206 (1960).

[201] 378 U.S. 52, 75 (1964).

was the holding for which Murphy is most often cited, that being--based on historical and policy considerations--that the Fifth Amendment's privilege against self-incrimination "protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law."[202] Only then did the Court look to see how state legislation dealing with immunity would be affected.

In this regard the Court considered the holding of Counselman v. Hitchcock[203] to be a valid one. That this is so is demonstrated by the application of that holding to the holding of the instant case that the privilege protects state witnesses from federal prosecutions, and the recognition that the same standards must be utilized to determine if the witness' "'silence in either a federal or state proceeding is justified.'"[204] The result of that application was not that the Court was changing the rule of Counselman; rather the effect was to add another rule.[205]

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[202] Id. at 77-78.

[203] 142 U.S. 547 (1892).

[204] 378 U.S. 52, 79 (1964) quoting Malloy v. Hogan, 378 U.S. 1, 11 (1964).

[205] It should be well noted that Counselman's holding, which announced the transactional immunity standard,

And it was here that the Court reverted to a practice engaged in by its ancestor exactly twenty years before in Feldman v. United States.[206] In analogizing the problem presented in the instant case again to the illegal search and seizure cases the Court held that neither the state-compelled testimony nor its fruits could henceforth be used in federal prosecutions.[207] This was required, said the Court, to accommodate both federal and state interests as respected investigating and prosecuting crime and the effect of the new constitutional rule would be the furthering of state ability to obtain necessary information while leaving "the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity."[208] But this simply is not so. If no immunity statute were involved, neither the state government nor the federal government, in light of the Malloy decision, could lawfully compel a

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was grounded upon a federal statute which, as viewed by that Court, provided insufficient protection from feared federal prosecution. Thus only a single sovereignty problem was presented. In Murphy a state statute was involved but what was feared by the witnesses was federal prosecution. As such, this raised a dual sovereignty problem.

[206] 322 U.S. 487 (1944).

[207] 378 U.S. 52, 79 (1964).

[208] Id. (emphasis added).

witness to speak if to do so would tend to incriminate him.[209] Obviously the Court was more concerned with the state and federal governments' ability not to encroach upon one another's sphere of responsibility than individual rights secured under the Constitution.[210] And it accomplished this result by resorting to a rule which clearly was intended to protect an accused from constitutionally impermissible police practices, not one intended to protect a witness from an unconstitutional inquisition.[211]

Apparently all nine Justices were content to let this happen. Again, as in Malloy, three opinions were issued in the case, with identical jurist distribution. The main concern of Justices Harlan and Clark was the nature, rather than the effect, of the rule announced. To them the basic result should have been achieved through the use of an exclusionary rule grounded upon the Court's supervisory authority over the administration of justice

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[209] See Counselman v. Hitchcock, 142 U.S. 547, 585-586 (1892).

[210] See 378 U.S. 52, 79 (1964); id. at 101 (White and Stewart, JJ., concurring).

[211] See 378 U.S. 52, 79 (1964); id. at 74-75; id. at 103 (White and Stewart, JJ., concurring).

in the federal court system rather than on a constitutional rule.[212] The approach which was taken, argued these Justices, posed a viable threat to the concept of federalism,[213] the same observation made earlier that same day in Malloy.[214] However, in that the rule adopted was seen as both prohibiting federal use and derivative use of state-compelled testimony and preserving federal prosecutorial options subsequent to state investigations, the operation of the rule was viewed as an acceptable method of effectuation of viable joint crime prevention programs.[215] This same conclusion was reached by Justices White and Stewart[216] whose major concern was that if the rule just formulated included transactional immunity the federal government would be the sole sovereign which could grant immunity, since the states

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[212] 378 U.S. 52, 80-81 (1964)(Harlan and Clark, JJ., concurring); id. at 89-91.

[213] Id. at 90-92.

[214] Malloy v. Hogan, 378 U.S. 1, 14 (1964)(Harlan and Clark, JJ., concurring).

[215] 378 U.S. 52, 91-92 (1964)(Harlan and Clark, JJ., concurring). In taking this position it was acknowledged by these Justices that the question of whether federally compelled evidence could be used in state prosecutions was a matter outside the scope of then present considerations. Id. at 92 n. 8.

[216] 378 U.S. 52, 101 (1964)(White and Stewart, JJ., concurring).

are precluded from granting federal immunity,[217] thus totally voiding all state immunity statutes.[218] Were this to happen any state witness would be free, on the basis of Malloy,[219] to thwart state investigatory efforts since "invariably answers incriminating under state law can be claimed to be incriminating under federal law."[220] While this might be a valid argument where dual sovereignty problems arise, it has no bearing on cases involving the scope of immunity in single sovereignty situations; however, less than a decade later a single sovereignty problem reached the Court and was resolved without regard for this distinction.

In Kastigar v. United States[221] a witness had refused to testify before a federal grand jury, despite a federal grant of immunity pursuant to the provisions of a new statute,[222] contending that he was not adequately pro-

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[217] Id. at 93; id. at 97.

[218] Id. at 93.

[219] Malloy v. Hogan, 378 U.S. 1 (1964).

[220] 378 U.S. 52, 97 (1964)(White and Stewart, JJ., concurring).

[221] 406 U.S. 441 (1972).

[222] 18 U.S.C. §§ 6001-6003 (1970).

tected since the grant extended only use and derivative use immunity. On appeal, subsequent to the usual contempt citation and associated incarceration, it was urged that no immunity statute afforded a constitutionally sound basis for testimonial compulsion, or, in the alternative, that the then effective statute did not contain immunity sufficiently broad in scope to be extensive with, and thus supplant, the Fifth Amendment privilege. After summarily rejecting the first contention,[223] the five-member majority[224] went on to consider the second claim. In so doing the majority considered the constitutional question to be whether the scope of the immunity under scrutiny was coextensive with the privilege, for if it was, petitioner's claim must fail.[225] While it noted merely in passing that the question posed in Murphy was not precisely the same as the one which was presented by the case at bar[226] the majority held,

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[223]Here the Court specifically refused to overrule Brown v. Walker, 161 U.S. 591 (1896). 406 U.S. 441, 448 (1972).

[224]In that neither Justice Brennan, one of the five to join in one of the opinions in Murphy v. Waterfront Commission of New York, 378 U.S. 52 (1964), nor Justice Rehnquist participated, the Kastigar minority numbered only two.

[225]Kastigar v. United States, 406 U.S. 441, 449 (1972).

[226]Id. at 457.

on language gleaned from the Murphy opinion, that use and derivative use immunity was coextensive with the scope of the privilege and thus, once granted, such could be utilized to compel witness testimony even in the face of a claim by the witness of the privilege.[227] This result was accomplished by the adroit, but perceivable, use of judicial legerdemain which was essentially a two-step process. First, the majority relied upon Malloy[228] for the proposition that standards respecting the scope of the privilege were the same in both federal and state courts.[229] This ignored the fact that all of the Justices involved in that decision tacitly had no real objective other than to determine whether or not federal standards were applicable to state proceedings and whether those standards had been met in order to conclude whether or not the state witness had validly claimed his privilege; clearly in that case the scope of the immunity was not involved.[230] Second, since

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[227] Id. at 453.

[228] Malloy v. Hogan, 378 U.S. 1 (1964).

[229] Kastigar v. United States, 406 U.S. 441, 458 n. 47 (1972).

[230] See notes 183-190 supra and accompanying text.

Murphy[231] decided that use and derivative use immunity adequately protected a state witness from federal prosecutorial hazards,[232] and Malloy held that the same standards were applicable to both federal and state witnesses as respects the scope of the privilege, then clearly use and derivative use immunity was coextensive with the Fifth Amendment privilege against self-incrimination.[233] However, this ignored the underlying premise of the Murphy decision that the rule therein announced had to accommodate both federal and state interests in the ferretting out and prosecution of criminal offenders[234]--in short, a dual sovereignty problem not presented in Kastigar.

In attempting to bolster its decision the majority baldly stated that transactional immunity was broader than the protection afforded by the Fifth Amendment's privilege and that the privilege had "never been construed to mean that one who invokes it cannot subsequently be prosecuted."[235]

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[231] Murphy v. Waterfront Commission of New York, 378 U.S. 52 (1964).

[232] Kastigar v. United States, 406 U.S. 441, 458 (1972).

[233] Id.

[234] See notes 203-208 supra and accompanying text.

[235] 406 U.S. 441, 453 (1964).

This was to overlook not only the teachings of Counselman[236] but the product of the efforts of legal scholars as well. As respects the latter, both major compilations in existence at the time Kastigar was decided which dealt with the subject of self-incrimination in an evidentiary sense specifically refuted such a suggestion.[237] Further, even Wigmore, who accepted use and derivative use immunity under limited circumstances,[238] advocated the adoption of the Model State Witness Immunity Act[239] which, by its terms, purports to grant transactional immunity.[240] Additionally,

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[236]Counselman v. Hitchcock, 142 U.S. 547 (1892).

[237]The drafters of the Model Code of Evidence considered the object of the privilege against self-incrimination to be protection against punishment and that to be valid an immunity statute had to grant the one from whom the evidence was sought to be compelled immunity from prosecution. See Model Code of Evidence rule 202, Comment (1942). They asserted that for the privilege to be properly displaced punishment had to be made impossible. Id. This same requirement of impossibility was recognized as being essential by the authors of the Uniform Rules. See Uniform Rules of Evidence rule 24, Commissioner's Note (1953).

[238]8 Wigmore, Evidence § 2283, at 524-525 (McNaughton rev. 1961).

[239]Id. § 2284, at 525-526 n. 1 and accompanying text.

[240]Model State Witness Immunity Act, 9C U.L.A. 186, 206 (1957).

the Kastigar majority contended that the statute under consideration had been "drafted to meet what Congress judged to be the conceptual basis of Counselman, as elaborated in subsequent decisions of the Court . . . ."[241] While this may be true, it is clear from the cases relied on by various members of Congress, in light of their less than complete persuasiveness, that such conceptual basis was misconstrued.[242]

Both of the dissenters in Kastigar recognized that the problem therein was separate and distinct from the dual sovereignty situation presented by the Murphy fact pattern.[243] These Justices recognized that to expect that a ban on use and derivative use immunity could be enforced was to exercise in futility.[244] Only Justice Marshall went further.

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[241] Kastigar v. United States, 406 U.S. 441, 452-453 (1972)(emphasis added).

[242] Compare remarks of Rep. Kastenmeier, majority report, House Committee on the Judiciary, H.R. Rep. No. 91-1188, 91st Cong., 2d Sess. 11-12 (1970) with remarks of Rep. Ryan, minority report, House Committee on the Judiciary, id. at 41-42. See also U. S. Code Congressional and Administrative News, 91st Cong., 2d Sess. (1970) at 4017-4018.

[243] Kastigar v. United States, 406 U.S. 441, 463-465 (1972)(Douglas, J., dissenting); id. at 467-468 (Marshall, J., dissenting).

[244] 406 U.S. at 466-467 (Douglas, J., dissenting); id. at 469-470 (Marshall, J., dissenting).

Whereas the majority had fashioned a procedural rule to implement its constitutional one[245] Justice Marshall saw this to be an inadequate measure of protection "in light of the inevitable uncertainties of the fact-finding process . . . ."[246] In this regard the witness-accused was at the mercy of the prosecutorial authorities since only they had knowledge which would tend to show that evidence was in fact tainted.[247] The majority countered this by the assertion that such was negatived by the prosecution's burden to prove lack of taint.[248] The fallacy of this position is that there is a threshold requirement that the defendant show that he testified, under a grant of immunity, to matters related to the prosecution.[249] Also the immunity

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[245]The rule which the majority formulated was that in each case the prosecution has an "affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." 406 U.S. at 460. At least one federal appellate court has held that this burden cannot be met by a mere prosecutorial assertion. See United States v. Seiffert, 463 F.2d 1089 (5th Cir. 1972).

[246]406 U.S. 441, 468-469 (1972)(Marshall, J., dissenting).

[247]Id. at 469.

[248]See note 245 supra.

[249]406 U.S. 441, 460 (1972).

itself depends upon the testimony which is actually given, and, where use and derivative use immunity is involved, such is often difficult to determine with precision[250] especially where no transcript is made of the proceedings.[251] Further, even an even-handed prosecutor, asserted Justice Marshall, could not be sure that evidence was completely

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[250] See Murphy v. Waterfront Commission of New York, 378 U.S. 52, 99 (1964)(White and Stewart, JJ., concurring); id. at 104.

[251] While it is agreed that to transcribe the grand jury proceedings would be the better practice there appears neither constitutional nor federal statutory mandate for such endeavor. See United States v. Battisti, 486 F.2d 961 (6th Cir. 1973)(collecting cases); United States v. Arradondo, 483 F.2d 980 (8th Cir. 1973)(collecting cases); United States v. Harper, 432 F.2d 100 (5th Cir. 1970). One federal appellate court tends to grant preindictment requests for recordation absent a government showing that a legitimate and compelling governmental interest will be served by a denial. United States v. Price, 474 F.2d 1223 (9th Cir. 1973). Some federal courts have provided for all-inclusive transcription by court rule. See United States v. Aloisio, 440 F.2d 705, 708 n. 2 (7th Cir. 1971), cert. denied, 404 U.S. 824 (1971). Others have utilized the law of the case to reach the same result. See United States v. Gramolini, 301 F. Supp. 39 (1969); cf. United States v. King, 335 F. Supp. 523, 553 (1971). Only a handful of states, via statute, require that a transcript be made. See Cal. Pen. Code Ann. § 938.1 (Deering, 1970); Iowa Code Ann. § 772.4 (1950); Ky. Rev. Stat. Ann. § 5.16 (Crim. R. 1969); Minn. Stat. Ann. § 628.04 (1947); Okla. Stat. Ann. tit. 22, § 340 (1969). One state apparently requires transcription only upon the request of the prosecutor. See Ohio Rev. Code Ann. § 2939.11 (1954).

free of taint.[252] Finally, it was argued that the majority's analogy to the exclusionary rule, as used in coerced confession-illegal search and seizure cases, was not well founded, both because immunity grants remove the privilege completely and because they operate prior to the interrogation which is itself conducted by legally tutored individuals operating in a calm and dispassionate environment; for this reason alone, said Justice Marshall, the standard to be applied to immunity statutes should be more stringent than that which the majority espoused.[253]

But the damage had been done and in fact a much less stringent standard prevailed. As far as the federal criminal justice system was concerned transactional immunity was a dead issue. That in itself would have been a cruel blow to individual liberty; however, the Burger Court

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[252]406 U.S. 441, 469 (1972)(Marshall, J., dissenting). This would be especially true in a dual sovereignty situation. Only recently a federal district court judge dismissed a conspiracy charge against one of those accused in connection with the burglary at the office of Daniel (Pentagon Papers) Ellsberg's psychiatrist. The judge reasoned that since the accused had testified to the details of the burglary pursuant to immunity granted in both Florida and California it would be difficult for the prosecutors, despite their claim to the contrary, to prove that the evidence was untainted. See The Miami Herald, May 22, 1974, § A, at 10, col. 1.

[253]406 U.S. 441, 470-471 (1972)(Marshall, J., dissenting).

was not satisfied to leave a task only half completed. On the same day that it decided Kastigar a similarly divided Court held that a state statute which granted only use and derivative use immunity was constitutionally acceptable as a substitute for the Fifth Amendment privilege against self-incrimination claimed by state witnesses[254]--and this holding was bottomed squarely, albeit precariously, upon the Kastigar decision. The Burger majority had paved the way for the result intended by the two Justices who had taken part in both the Murphy and Kastigar decisions and this intent was not only that transactional immunity should not apply to federal witnesses[255] but that it also should not apply to state witnesses. Given the decision in Zicarelli v. Investigation Commission,[256] which reached that very result, the state statutes drafted to conform with the decision in Counselman v. Hitchcock[257] are surely destined to be repealed. With them will go the last assurance that a

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[254] Zicarelli v. Investigation Commission, 406 U.S. 472 (1972).

[255] See Murphy v. Waterfront Commission of New York, 378 U.S. 52, 92-93 (1964)(White and Stewart, JJ., concurring).

[256] 407 U.S. 472 (1972).

[257] 142 U.S. 547 (1892).

witness can be compelled to testify before grand juries, legislative committees, and administrative agencies without being placed in criminal jeopardy. Even while they exist danger lurks in the guise of any would-be second sovereign.

CHAPTER IV.

STATEMENTS COMPELLED BY COOPERATION IN MANDATORY MENTAL EXAMINATIONS

Perhaps the most insidious method of extracting testimonial disclosures from an accused is encountered on those occasions when his mental condition is at issue. Specifically, such condition may significantly bear upon a defendant's ability to stand trial,[258] affirmative defenses raised by him to negative a finding of guilt respecting the crime charged,[259] or specific acts alleged or proven which bring him within the scope of statutes which have as their purpose the unique isolation from society of

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[258] Whether or not an accused has the mental ability to be subjected to the criminal justice trial procedure is most recognized as being a matter of competency and it is in this context that the term will hereinafter be utilized.

[259] Issues raised by the defendant's mental state at the time of the alleged offense are resolved by evidence relating to his mental responsibility and it is in this context that the term will hereinafter be utilized.

certain classes of offenders.[260] In all three situations an accused, in most jurisdictions, will be required to submit to a court-ordered mental examination, such being mandated either by statute or court decision. The danger to the accused which inheres in these examinations is that he must disclose to another that which may be the basis of expert testimony against him later at trial.

At first blush the use of this information would seem to be precluded by the physician-patient privilege. However, the privilege is a creature of statute, being unknown to the common law,[261] and thus does not have universal application. While numerous states have recognized the privilege[262] and the federal courts may be bound by a similar one[263] the general view appears to be that since the

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[260]These statutes have been referred to both as defective delinquent and sexual psychopath legislation; the latter will hereinafter be utilized.

[261]McCormick, Evidence § 98 at 212 (2d ed. 1972); 58 Am. Jur. Witnesses § 401 at 232 (1948).

[262]See 8 Wigmore, Evidence § 2286 (McNaughton rev. Supp. 1972)(collecting statutes).

[263]The federal courts, while not being bound by this privilege, see e.g., Ramer v. United States, 411 F.2d 30 (9th Cir. 1969), cert. denied, 396 U.S. 965 (1969), may soon be required to take cognizance of the psychotherapist-patient privilege. See Federal Rules of Evidence rule 504 (1972). This provision will not make professional conversations privileged, however, where the judge orders an examination

mental examination has been ordered by the court, the consultation is for a purpose other than that of ultimate curative or alleviative treatment and thus these communications fall outside the privilege, as do reports which are submitted subsequent thereto.[264] Similarly, the two older codifications of evidentiary rules refute any contention that the privilege applies where the patient is urging his mental condition as a defense to a criminal prosecution.[265]

A much more cogent inquiry centers on the validity of these compulsory mental examinations in light of an accused's privilege against self-incrimination. While the Federal Rules of Evidence are silent on this subject its predecessors viewed the privilege as inapplicable to these examinations, taking the view of the allegedly better con-

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of the mental or emotional condition of the patient, id. rule 504(d)(2), or where the patient relies upon the mental or emotional condition as an element of his claim or defense, id. rule 504(d)(3). There apparently was indicated by the common law a disposition to recognize the psychotherapist-patient privilege. Federal Rules of Evidence rule 504, Advisory Committee's Note (1972).

[264] See 8 Wigmore, Evidence § 2382 at 835-836 (McNaughton rev. 1961); McCormick, Evidence § 99 at 214 (2d ed. 1972); id. § 313 at 733; 58 Am. Jur., Witnesses § 418 at 239 (1948).

[265] Model Code of Evidence rule 223(3)(1942); Uniform Rules of Evidence rule 27(4)(1953).

sidered cases.[266] Irrespective of whether the individual statute's or judicial pronouncement's mandate was the ascertaining of an accused's competency or responsibility or both, the requirement has formerly withstood attacks directed at its unconstitutionality.[267] Specifically, there have been no less than seventeen states which have rejected defendant's contentions that the compulsory procedure violated their privilege against self-incrimination.[268] As shall presently be seen this position has been recently retreated from somewhat in a few jurisdictions. Prior to viewing these departures from the judicial norm, however, a discussion of existing statutory requirements is in order.

The legislatures of forty states have seen fit to provide for the initiation of mental examinations where for some reason there arises, either at trial or prior thereto,

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[266] Model Code of Evidence rule 205(a)(1942); id. rule 205, Comment (1942); Uniform Rules of Evidence rule 25(b)(1953); id. rule 25(b), Commissioner's Note (1953).

[267] See 8 Wigmore, Evidence § 2265(10) at 399 (McNaughton rev. 1961); McCormick, Evidence § 134 at 285-286 (2d ed. 1972); 21 Am. Jur. 2d, Criminal Law § 365 at 389 (1965).

[268] See Annot., 32 A.L.R. 2d 434, § 5 at 445 (1953).

a question concerning the accused's competency to stand trial.[269] Although three states limit the power of the court to order a competency examination to those situations where the accused is charged with a felony[270] and six states condition the grant of power to situations where the accused has had an indictment or information filed against him,[271] the majority of jurisdictions permit the ordering of the examination in conjunction with the trial of any criminal case. Twenty states require that a competency examination shall be ordered by the court where there are reasonable grounds to believe that the accused is incompetent to proceed.[272] In fourteen other states an

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[269]The courts of two other states have indicated that this may lawfully be required. See State v. Gaffney, 237 Ia. 1399, 25 N.W. 2d 352 (1946); State v. Wheeler, 195 Kan. 184, 403 P.2d 1015 (1965).

[270]Ala. Code Ann. tit. 15, §§ 425-426 (1958); Miss. Code Ann. § 99-13-11 (1972); N.C. Gen. Stat. Ann. § 12-91 (Supp. 1971).

[271]Ariz. R. Crim. P. 11.2 (1973); Ark. Stat. Ann. § 43-1301 (Supp. 1971); Nev. Rev. Stat. Ann. § 178.405 (1971); N.D. Cent. Code Ann. § 29-20-01 (Supp. 1973); Okla. Stat. Ann. § 1162 (1958); S.D. Comp. L. Ann. § 23-38-2 (1967). In one state the procedures apply if the defendant has been indicted or bound over by the court to await the action of the grand jury. N.H. Rev. Stat. Ann. § 135:17 (Supp. 1972). Two other states require that the accused be in custody before the statutory provisions become effective. N.J. Stat. Ann. § 2A:163-2 (1971); R.I. Gen. L. Ann. § 26-4-3 (Supp. 1972).

[272]Ala. Code Ann. tit. 15, §§ 425-426 (1958); Ark.

examination will be ordered merely if the issue is raised.[273] The examination will only be ordered in four states if the accused interposes the defense of insanity[274] and in one state it appears that the accused first must raise the issue of present insanity via written application to the court.[275] However, there is authority for the propo-

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Stat. Ann. § 43-1301 (Supp. 1971); Cal. Pen. Code Ann. § 1368 (Deering, 1970); Colo. Code Crim. P. § 39-8-110(2)(a)(1972); Fla. R. Crim. P. 3.210(a)(1968); Idaho Code Ann. § 18-211(1) (Supp. 1973); Ind. Stat. Ann. § 9-1706a (Supp. 1973); Ky. R. Crim. P. § 8.06 (1969); Mo. Stat. Ann. § 552.020.2 (Supp. 1973); Mont. Rev. Code Ann. § 95-505(a)(1969); Nev. Rev. Stat. Ann. § 178.405 (1971); N.D. Cent. Code Ann. § 29-20-01 (Supp. 1973); Okla. Stat. Ann. § 1162 (1958); Ore. Rev. Stat. Ann. § 136.150 (1971-1972); Pa. Stat. Ann. tit. 50, § 4408(a)(1969); S.D. Comp. L. Ann. § 23-38-2 (1967); Tenn. Code Ann. § 33-701(a)(Supp. 1972); Vt. Stat. Ann. tit. 13, § 4821(a)(Supp. 1973); Va. Code Ann. § 19.1-229 (Supp. 1973); Wis. Stat. Ann. § 971.14(1)(1971).

[273]Ill. Stat. Ann. § 1005-2-1(b)(1973); Mass. Gen. L. Ann. ch. 123, § 99 (1969); Mich. Comp. L. Ann. § 767.27(a)(2) (1968); Miss. Code Ann. § 99-13-11 (1972); Neb. Rev. Stat. Ann. § 29-1823 (Supp. 1969); N.H. Rev. Stat. Ann. § 135:17 (Supp. 1972); N.J. Stat. Ann. § 2A:163-2 (1971); N.M. Stat. Ann. § 41-13-3.1 (1972); N.Y. Crim. P. L. § 730.30.1 (McKinney, 1971); N.C. Gen. Stat. § 122-91 (Supp. 1971); Ohio Rev. Code Ann. § 2945.40 (1954); R.I. Gen. L. Ann. § 26-4-3 (Supp. 1972); S.C. Code L. Ann. § 32-969 (Supp. 1971); W.Va. Code Ann. § 62-3-9 (1966).

[274]La. Stat. Ann. art. 650 (1967); Me. Rev. Stat. Ann. tit. 15, § 101 (Supp. 1972-1973); Md. Code Ann. art. 59, § 25 (1957); Wyo. Stat. Ann. § 7-241(A) (Supp. 1973).

[275]Tex. Code Crim. P. art. 46.02, § 1 (Supp. 1972-1973).

sition that such provisions are invalid in that they preclude the court from exercising its discretion sua sponte where the evidence raises a bona fide doubt as to the defendant's competency to stand trial.[276] In three states applicable statutes provide that a competency examination will be ordered if it appears that the accused, as a result of mental disease or defect, either is unable to understand the proceedings against him or assist in his own defense.[277]

There is almost unanimous agreement[278] that the issue of competency may properly be raised by any person who has an interest in the proceedings.[279] Once such issue is presented the trial court will be obliged to order the accused to be examined by one or more court-appointed medical experts prior to holding a hearing where competency will be determined. Almost one-half of those states which provide

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[276] See Pate v. Robinson, 383 U.S. 375 (1966).

[277] Ariz. R. Crim. P. 11.1 (1973); Alaska Stat. Ann. § 12.45.100 (Supp. 1973); Conn. Gen. Stat. Ann. § 54-40(a) (Supp. 1973). This is the standard adopted by the Model Penal Code. See Model Penal Code, art. 4, § 4.04 (Proposed Official Draft, 1962).

[278] See notes 274-276 supra and accompanying text.

[279] See e.g., Alaska Stat. Ann. § 12.45.100 (Supp. 1973); Ill. Stat. Ann. § 1005-2-1(b) (1973); Mich. Comp. L. Ann. § 767.27a(2) (1968); Utah Code Ann. § 77-48-2 (Supp. 1973).

for these examinations allow the accused to be committed to the appropriate state hospital for observation and examination. Of these only two states require that the examiner be a psychiatrist,[280] and one state makes the use of a psychiatrist optional.[281] Four states which prescribe commitment do not specify the medical qualifications of the examining physician[282] and one state provides the court with the option of appointing one or more private physicians in lieu of state employed ones.[283] Whereas most states do not specify the length of time that an accused may be retained in such state institution while undergoing mental examinations aimed at determining facts bearing on competency,[284] nine states do provide a maximum time limit which may be extended by court order where deemed necessary by

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[280] Colo. Code Crim. P. ch. 44, § 39-8-106(1) (1972); Conn. Gen. Stat. Ann. § 54-40(b) (Supp. 1973).

[281] Wyo. Stat. Ann. § 7-241(A) (Supp. 1973).

[282] Cal. Pen. Code Ann. § 1370 (Deering, 1970); Mass. Gen. L. Ann. ch. 123, § 99 (1969); S.C. Code L. Ann. § 32-969 (Supp. 1971); Tex. Code Crim. P. art. 46.02, § 2(f)(1) (Supp. 1972-1973).

[283] Mo. Stat. Ann. § 552.020.2 (Supp. 1973).

[284] It would seem that such could, in no event, exceed a reasonable time; if indeed the period is deemed excessive the state will be forced to release the accused. See Jackson v. Indiana, 406 U.S. 715, 738 (1972).

the judge.[285] Slightly more than half of the states which require these examinations do not require, as a prerequisite, that the defendant be committed. Of these, only seven states require that the examination be made by a psychiatrist[286]; two others make the use of a psychiatrist optional.[287] Six states provide merely that the examination

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[285]Sixty days has been set as a limit by seven of these states. Idaho Code Ann. § 18-211 (Supp. 1973); Md. Code Ann. art. 59, § 26 (1957); Mich. Comp. L. Ann. § 767.27(a)(3) (1968); Mont. Rev. Code Ann. § 95.505(a) (1969); N.C. Gen. Stat. Ann. § 122-91 (Supp. 1971); Okla. Stat. Ann. § 1171 (Supp. 1972-1973); Wis. Stat. Ann. § 971.14(2) (1971). This period is advocated by the Model Penal Code. See Model Penal Code art. 4, § 4.05(1) (Proposed Official Draft, 1962). One state has prescribed a thirty-day period, Ark. Stat. Ann. § 43-1301 (Supp. 1971), and one state has taken an intermediate position by prescribing a forty-five-day period. Va. Code Ann. § 19.1-228 (Supp. 1973).

[286]Alaska Stat. Ann. § 12.45.100 (Supp. 1973)(one psychiatrist); Me. Rev. Stat. Ann. tit. 15, § 101 (Supp. 1972-1973)(one or more psychiatrists, psychologists, or clinical psychologists); Miss. Code Ann. § 99-13-11 (1972) (competent psychiatrist); Nev. Rev. Stat. Ann. § 178.415.1 (two physicians, one of whom is a psychiatrist); N.Y. Crim. P.L. § 730.20.1 (McKinney, 1971)(two qualified psychiatrists); Ohio Rev. Code Ann. § 2945.40 (1954)(1-3 physicians specializing in mental diseases. One state allows both the prosecution and defense to nominate three mental health experts and requires the judge to select one from each side. Ariz. R. Crim. P. 11.3 (1973). The Model Penal Code specifies the use of at least one qualified psychiatrist. See Model Penal Code art. 4, § 4.05(1) (Proposed Official Draft, 1962).

[287]N.J. Stat. Ann. § 2A:163-2 (1971); Vt. Stat. Ann. tit. 13, § 4822 (Supp. 1973).

be conducted by two or more physicians[288] and four others require an examination by one or more qualified experts.[289] While four states do not specify the nature of the examination or the qualifications of the examiner[290] three others allow the appointment of a commission to provide the court with information pertinent to the issue of competency.[291]

During the course of the court-ordered mental examination the general rule is that only the accused and the appointed examiner are permitted to be present. This has been ameliorated somewhat by provisions applicable in a few states which allow an expert employed by the accused to take some part in the court-ordered procedure. Two states limit the participation of the defendant's expert to only observation

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[288] Ind. Stat. Ann. § 9-1706a (Supp. 1973); Neb. Rev. Stat. Ann. § 29-1823 (Supp. 1969); N.H. Rev. Stat. Ann. § 135:17 (Supp. 1972); Tenn. Code Ann. § 33-604(a) (Supp. 1972); Utah Code Ann. § 77-48-4 (1953); W. Va. Code Ann. § 62-3-9 (1966).

[289] Ill. Stat. Ann. § 1005-2-1(g) (1973); Fla. R. Crim. P. 3.210(a) (1968); N.D. Cent. Code Ann. § 29-20-01 (Supp. 1973); Ore. Rev. Stat. Ann. § 136.150 (1971-1972).

[290] Ky. R. Crim. P. § 8.06 (1969); N.M. Stat. Ann. § 41-13-3.2 (1972); R.I. Gen. L. Ann. § 26-4-3 (Supp. 1972); S.D. Comp. L. Ann. § 23-38.2 (1967).

[291] Ex parte Moody, 41 Ala. App. 367, 132 So. 2d 758 (1961); La. Stat. Ann. art. 650 (1967); Pa. Stat. Ann. tit. 50, § 4408(b) (1969).

of the examination conducted by the pre-selected examiner.[292] In four other jurisdictions the expert employed by the accused may take a more active part in the examination process.[293] Only three states provide that the defendant's attorney may be present during the mandatory mental examination.[294] As a general rule, the defendant is compelled to submit to the examination and to cooperate in its conduct; the penalty for his recalcitrance is the forfeiture of his right to introduce his own expert testimony on the subject of his competency.[295] And at least four state stat-

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[292] Ark. Stat. Ann. § 43-1301 (Supp. 1971); Conn. Gen. Stat. Ann. § 54-40(b) (Supp. 1973).

[293] Idaho Code Ann. § 18-211(1) (Supp. 1973); Mo. Stat. Ann. § 552.020.4 (Supp. 1973); Wis. Stat. Ann. § 971.14(7)(1971); Wyo. Stat. Ann. § 7-241(A) (Supp. 1973). This procedure is advocated by the Model Penal Code. See Model Penal Code art. 4, § 4.05(1) (Proposed Official Draft, 1962). The procedure is seen as both assuring the accused an opportunity for an adequate psychiatric examination by his own expert and providing for a procedure which could minimize expert differences of opinion later in court. See Model Penal Code art. 4, § 4.05(1), Comment (Tent. Draft No. 4, 1956).

[294] See In re Spencer, 46 Cal. Reptr. 753, 406 P.2d 33 (1965); Lee v. County Court of Erie County, 318 N.Y.S. 2d 705, 267 N.E. 2d 452 (1971); Commonwealth ex rel. McGurrin v. Shovlin, 435 Pa. 474, 257 A.2d 902 (1969).

[295] See e.g., Ariz. R. Crim. P. 11.2, Comment (1973); McMunn v. State, 264 So. 2d 868 (Fla. Ct. App. 1972).

utes provide that the written report submitted at the conclusion of the examination reflect the accused's noncooperation, if any, in order that such may be admitted as evidence on the competency issue.[296] Such reports are required in all cases involving mandatory competency examinations. In the vast majority of jurisdictions only the judge is privy to their contents. The trend, however, seems to be that legislatures and courts see merit in the information being imparted to both counsel involved and, as a result, eleven jurisdictions adhere to this policy.[297] Statutes in three other states limit access to the defense counsel.[298] The

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[296]Colo. Code Crim. P. ch. 44 § 39-8-106(2)(1972); Idaho Code Ann. § 18-211(3)(e) (Supp. 1973); Mont. Rev. Code Ann. § 95-505(c)(5)(1969); Tenn. Code Ann. § 33-604(a)(Supp. 1972). The same requirement is embodied in the Model Penal Code. See Model Penal Code art. 4, § 4.05(3) (Proposed Official Draft, 1962).

[297]Ariz. R. Crim. P. 11.4 (1973); Colo. Code Crim. P. ch. 44, § 39-8-106(4)(1972); Conn. Gen. Stat. Ann. § 54-40(b) (Supp. 1973); Idaho Code Ann. § 18-211(3)(e) (Supp. 1973); La. Stat. Ann. art. 645 (1967); Mo. Stat. Ann. § 552.020.2 (Supp. 1973); Vt. Stat. Ann. tit. 13, § 4823(b) (Supp. 1973); Va. Code Ann. § 19.1-228 (Supp. 1973); Wyo. Stat. Ann. § 7-241(A) (Supp. 1973); People v. Blank, 64 Misc. 2d 730, 315 N.Y.S. 2d 647 (1970); State v. Sauls, 224 La. 1063, 71 So. 2d 568 (1954). Such is in accord with the provisions of the Model Penal Code. See Model Penal Code art. 4, § 4.05 (3) (Proposed Official Draft, 1962).

[298]Mont. Rev. Code Ann. § 95-505(c)(5) (1969); N.Y. Crim. P.L. § 730.20.5 (McKinney, 1971); Wis. Stat. Ann. § 971.14(3) (1971).

report assumes greater significance in those eight minority jurisdictions which allow the report itself to be admitted into evidence,[299] a procedure designed to alleviate the taking of expert testimony in court.[300] Such is especially appropriate in that the vast majority of states provide that the judge, rather than the jury, will determine the issue of competency.[301]

Mandatory mental examinations are also prescribed where there is a question of the defendant's mental condition at the time of the alleged offense. Such are mandated

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[299] See Ark. Stat. Ann. § 43-1302 (Supp. 1971); Colo. Code Crim. P. ch. 44, § 39-8-106(2)(1972); Conn. Gen. Stat. Ann. § 54-40(b) (Supp. 1973); Idaho Code Ann. § 18-212(1) (Supp. 1973); Mo. Stat. Ann. § 552.020.6 (Supp. 1973); Mich. Comp. L. Ann. § 767.27a(4) (1968); Mont. Rev. Code Ann. § 95-506(a) (1969); Nev. Rev. Stat. Ann. § 178.415.2 (1971).

[300] This is the rationale behind the Model Penal Code provision, which carves out an exception to the hearsay rule, thus allowing the receipt into evidence of these documents. See Model Penal Code, art. 4, § 4.06(1), Comment (Tent. Draft No. 4, 1956).

[301] The majority adheres to the Model Penal Code rule. See Model Penal Code art. 4, § 4.06(1) (Proposed Official Draft, 1962). Three states, via statute or case law, allow a separate jury to decide the issue of competency. See Cal. Pen. Code Ann. § 1370 (Deering, 1970); S.D. Comp. L. Ann. § 23-38-2 (1967); Zachery v. Hale, 286 F. Supp. 237 (M.D. Ala. 1968). One state has provided that, where the issue is raised prior to trial, a jury trial may be requested by either the court or the prosecutor; if the issue is raised after the start of trial the matter is to be resolved by the court. Ill. Stat. Ann. § 1005-2-1(d) (1973).

by statute in thirty-six states, the majority of which apply regardless of the offense involved.[302] Two states, however, require that the accused be charged with a felony[303] and one state requires that the offense be capital[304] before the statute will apply; eight other states limit the operation of the applicable statute in indictable crimes.[305] Almost one-half of these states provide for the mandatory examination only where the accused pleads "not guilty by reason of insanity" or joins this plea with one or more other pleas.[306] One-third of the jurisdictions require the

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[302]In one additional state the procedure is a creature of case law. See People v. Martin, 386 Mich. 407, 192 N.W. 2d 215 (1971), cert. denied, 408 U.S. 929 (1971), which holds that the examination may be ordered if the accused raises the plea of "not guilty by reason of insanity."

[303]Miss. Code Ann. § 99-13-11 (1972); N.C. Gen. Stat. Ann. § 122-91 (Supp. 1971).

[304]Ala. Code Ann. tit. 15, § 425 (1958).

[305]Ariz. R. Crim. P. 11.2 (1973); Ark. Stat. Ann. § 43-1301 (Supp. 1971); Me. Rev. Stat. Ann. tit. 15, § 101 (Supp. 1972-1973); Nev. Rev. Stat. Ann. § 178.405 (1971); N.H. Rev. Stat. Ann. §135:17 (Supp. 1972); N.J. Stat. Ann. § 2A:163-2 (1971); N.D. Cent. Code Ann. § 29-20-03 (1960); Okla. Stat. Ann. § 1162 (1958).

[306]Of the sixteen states in this category six require that the accused file a written notice of his intent to enter such a plea. Fla. R. Crim. P. 3.210(b) (1968); Idaho Code Ann. § 18-211(1) (Supp. 1973); Mont. Rev. Code Ann. § 95-505(a) (1969); Utah Code Ann. § 77-24-17 (1953); Vt. Stat. Ann. tit. 13, § 4821 (Supp. 1973); Wis. Stat. Ann. § 971.16 (1) (1971). This comports with the provisions of the Model

examinations where there is reasonable ground to believe that the defendant was not mentally responsible at the time of the offense.[307] The examination will be ordered in nine states where the issue of responsibility is raised in any manner.[308] After the issue has been raised, approximately two-thirds of the states requiring mental examinations provide a statutory mechanism which enables the accused to be committed for this purpose. Only eight of these jurisdictions provide for one or more psychiatrists to perform the

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Penal Code. See Model Penal Code, art. 4, § 4.03(2) (Proposed Official Draft, 1962). The other states have no such requirement. See Cal. Pen. Code Ann. § 1026 (Deering 1970); Colo. Code Crim. P. ch. 44, § 39-8-105 (1972); Ind. Stat. Ann. § 9-1702 (1956); La. Stat. Ann. art. 650 (1967); Me. Rev. Stat. Ann. tit. 15, § 101 (Supp. 1972-1973); Md. Code Ann. art. 59, § 25 (1957); Mo. Stat. Ann. § 552.030.2 (Supp. 1973); N.H. Rev. Stat. Ann. § 135:17 (Supp. 1972); S.D. Comp. L. Ann. § 23-37-2 (1967). See also note 302 supra.

[307]Ala. Code Ann. tit. 15, § 425 (1958); Ark. Stat. Ann. § 43-1301 (Supp. 1971); Mass. Gen. L. Ann. ch. 123 § 99 (1969); Nev. Rev. Stat. Ann. § 178.405 (1971); N.Y. Crim. P.L. § 730.30.1 (McKinney 1971); N.D. Cent. Code Ann. § 29-20-03 (1960); Okla. Stat. Ann. § 1162 (1958); Ore. Rev. Stat. Ann. § 136.150(1) (1971-1972); Pa. Stat. Ann. tit. 50, § 4408 (a) (1969); Tenn. Code Ann. § 33-701(a) (Supp. 1972); Va. Code Ann. § 19.1-229 (Supp. 1973); W.Va. Code Ann. § 62-3-9 (1966).

[308]Alaska Stat. Ann. § 12.45.087 (1962); Ariz. R. Crim. P. 11.2 (1973); Miss. Code Ann. § 99-13-11 (1972); N.J. Stat. Ann. § 2A:163-2 (1971); N.C. Gen. Stat. Ann. § 122-91 (Supp. 1971); Ohio Rev. Code Ann. § 2945.40 (1954); S.C. Code L. Ann. § 32-969 (Supp. 1971); Tex. Code Crim. P. art. 46.02, § 1 (Supp. 1972-1973).

examination.[309] The remainder either merely require that the examiner be a disinterested physician or other expert[310] or do not specify the qualifications of the examiner.[311] Of those jurisdictions where commitment is required a few states prescribe no specific period[312] while the vast majority set a period of between one month and sixty days.[313] Where commitment is not specified only seven states mandate a psychiatric examination.[314]

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[309]Alaska Stat. Ann. § 12.45.087 (1962); Idaho Code Ann. § 18-211 (Supp. 1973); Me. Rev. Stat. Ann. tit. 15, § 101 (Supp. 1972-1973); Mont. Rev. Code Ann. § 95-505(a) (1969); N.Y. Crim. P.L. § 730.20.1 (McKinney, 1971); Ohio Rev. Code Ann. § 2945.40 (1954); Vt. Stat. Ann. tit. 13, § 4822(a) (Supp. 1973); Va. Code Ann. § 19.1-228 (Supp. 1973).

[310]See e.g., La. Stat. Ann. art. 644 (1967); N.D. Cent. Code Ann. § 29-20-03 (1960).

[311]See e.g., N.H. Rev. Stat. Ann. § 135.17 (Supp. 1972).

[312]See e.g., Mo. Stat. Ann. § 552.020.4 (Supp. 1973); S.C. Code L. Ann. § 32-969 (Supp. 1971). Such period cannot exceed a reasonable time, however. See note 284 supra and accompanying text.

[313]See e.g., Ohio Rev. Code Ann. § 2945.40 (1954); Va. Code Ann. § 19.1-228 (Supp. 1973); Pa. Stat. Ann. tit. 50, § 4408(c) (1969). The period prescribed by the Model Penal Code is sixty days. Model Penal Code art. 4, § 4.05 (1) (Proposed Official Draft, 1962).

[314]Ala. Code Ann. tit. 15, § 425 (1958); Cal. Pen. Code Ann. § 1027 (Deering, 1970); Colo. Code Crim. P. ch. 44, § 39-8-106(1) (1972); Miss. Code Ann. § 99-13-11 (1972); Mont. Rev. Code Ann. § 95-507(b) (1969); Nev. Rev. Stat. Ann. § 178.415.1 (1971); N.J. Stat. Ann. § 2A: 163-2 (1971).

All that is required in the other eight jurisdictions is that the examination be made by a physician or other expert.[315]

As in the case of examinations ordered to establish competency, where the accused is required to submit to an examination for the purpose of gaining information relative to mental responsibility the usual practice is to exclude both medical experts secured by the defense as well as the defense attorney. However, one state allows a medical expert employed by the defense to witness the examination[316] and five others do not exclude his active participation therein.[317] Two states allow both the defense counsel and the prosecutor to be present, if they wish, at the examination.[318] Again, the accused is generally required both to submit to the examination and cooperate with the medical expert who conducts it or else give up his right to in-

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[315] See e.g., Ariz. R. Crim. P. 11.3 (1973); W.Va. Code Ann. § 62-3-9 (1966).

[316] Ark. Stat. Ann. § 43-1301 (Supp. 1971).

[317] See note 293 supra. See also Alaska Stat. Ann. § 12.45.087 (1962); Mont. Rev. Code Ann. § 95.505(a) (1969).

[318] Fla. R. Crim. P. 3.210(b) (1968); Lee v. County Court of Erie County, 318 N.Y.S. 2d 705, 715, 267 N.E. 2d 452 (1971).

troduce his own expert testimony respecting the issue of responsibility.[319] The report of the examination, which is required in all cases where an examination is conducted to determine mental responsibility, is usually submitted to and subject to use by the court, but in thirteen jurisdictions both the prosecutor and defense counsel receive copies[320]; three other jurisdictions limit this additional access to defense counsel.[321] While the report is usually excluded from evidence at trial where mental responsibility is at issue, one state affirmatively provides that it shall be so utilized,[322] one state affirmatively bars such use,[323]

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[319] See note 295 supra. One case suggests that although an accused may be precluded from offering expert testimony, he may nonetheless be permitted to introduce lay testimony; however, in such a case the prosecution is entitled to jury instruction on this testimony with respect to the presumption of sanity and on the accused's failure to cooperate. See Lee v. County Court of Erie County, 318 N.Y.S. 2d 705, 713, 267 N.E. 2d 452 (1971).

[320] See note 297, supra. See also Ala. Code Ann. tit. 15, § 425 (1958); Alaska Stat. Ann. § 12.45.087 (1962).

[321] See note 298 supra.

[322] Ark. Stat. Ann. § 43-1302 (Supp. 1971).

[323] People v. Lund, 15 A.D. 2d 582, 223 N.Y.S. 2d 49 (1961).

and two other states allow its use in the cross-examination of the expert witness who prepared it.[324]

The most obvious objection to mandatory mental examinations which seek to determine the defendant's competency or responsibility or both is that the accused will thereby be forced to reveal information which may later be used against him in violation of his privilege against self-incrimination. Where only competency is at issue the initial response to this is that the information cannot incriminate because in all cases this issue is resolved prior to trial on the merits by either the court or a separate jury.[325] This response, however, does not take into consideration other uses to which this information may be put, either in other criminal prosecutions or the same prosecution, should the defendant be found competent. If the only issue involves responsibility, the most direct consequence is that, in a unitary trial, the trier of fact will hear from the mouth of the expert witness incriminating statements which, although allegedly limited by instruction to the issue of responsibility, are highly prejudicial to the accused.

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[324] Ohio Rev. Code Ann. § 2945 (1954); cf. Wis. Stat. Ann. § 971.16(2) (1971).

[325] See note 301 supra and accompanying text.

Further, such information compelled from the accused could be utilized against him in other prosecutions irrespective of whether or not he is found irresponsible as respects the offense for which he is currently being tried.[326] In an effort to alleviate this problem some states prohibit the introduction of the accused's compelled statements on the issue of guilt at the present proceedings.[327] Another state, while adhering to this procedure, permits these statements to be used to impeach or rebut the accused's testimony if he takes the stand during the trial of the current case.[328] While also foreclosing the use of these statements during the case at bar, another state prevents the prosecutor from utilizing them as investigatory leads to acquire other evi-

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[326] An accused could be found not to be responsible and thus committed to a state mental institution. However, he could be free again under state provisions which limit such detention to two-thirds of what the maximum prison term would have been. Just such a situation has recently come to light involving New York. See Miami Herald, Dec. 12, 1973, § A, at 15, col. 3. At the time of such release there may well be viable charges still pending against him. This has been demonstrated in the not-too-distant past by one Louisiana case. See Miami Herald, Sept. 26, 1973, § A, at 1, col. 3.

[327] See State v. Hathaway, 116 Me. 255, 211 A.2d 558 (1965); Mich. Comp. L. Ann. § 767.27 (1968).

[328] Colo. Code Crim. P. Ch. 44, § 39-8-107 (1972).

dence of the crime charged.[329] Three other states prohibit the examiner from testifying at the present trial about facts of any sort elicited from the accused during the examination.[330] Five states track the wording of the Model Penal Code and provide that any such statement compelled from the accused may not be admitted against him in any criminal action on any issue other than his mental condition unless such statement constitutes an admission of guilt respecting the crime charged, since in that event it is inadmissible for any purpose.[331] One state statute prevents the use of the accused's statements in any criminal case both on the issue of guilt as well as for use limited to impeachment[332]; another attempts to bar the use of such

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[329] See State v. Olstein, 52 N.J. 516, 247 A.2d 5 (1968).

[330] See Alaska Stat. Ann. § 12.45.100 (Supp. 1973); Fla. R. Crim. P. 3.210 (1968); Ill. Stat. Ann. § 1005-2-1 (h) (1973).

[331] N.Y. Crim. P.L. § 730.20.1 (McKinney, 1971); Idaho Code Ann. § 18-215 (Supp. 1973); Mont. Rev. Code Ann. § 95-509 (1969); Tex. Code Crim. P. art. 46.02, § 2(f)(4)(Supp. 1972-1973); Wis. Stat. Ann. § 971.18 (1971). See Model Penal Code, art. 4, § 4.09 (Proposed Official Draft, 1962). It is clear that the word "statement" refers to both confessions and admissions. See id., Comment.

[332] Vt. Stat. Ann. tit. 13, § 4822(c) (Supp. 1973).

statements on the issue of guilt in any criminal case, state or federal.[333]

Apparently the legislature of only one state acknowledges appreciation for the broader problems involved where statements compelled by mandatory mental examinations are concerned. Clearly noted are four ways by which an accused may incriminate himself while cooperating in a court-ordered mental examination: (1) he may implicate himself in the crime charged by his utterances; (2) he may implicate himself in other crimes by his utterances; (3) whether or not he relies on the competency or responsibility issue at trial, evidence of his mental condition may be used by the prosecution to establish the mens rea element, thus building a prima facie case; and (4) his compelled disclosures may well provide the prosecution with evidence to defeat any claim at trial of either competency or responsibility.[334] In that an accused is compelled, in this jurisdiction, to cooperate in mental examinations which seek evidence of competency and/or responsibility,[335] safeguards in excess of

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[333] Mo. Stat. Ann. §§ 552.020, 552.030 (Supp. 1973).

[334] See Ariz. R. Crim. P. 11.7, Comment (1973).

[335] See Ariz. R. Crim. P. 11.2, Comment (1973).

those specified in other jurisdictions are provided. First, no statement so compelled or evidence resulting therefrom concerning the acts upon which the current charges are based is admissible on the issue of guilt or innocence in the present trial or any subsequent trial involving the present charges.[336] Second, no statement so compelled or evidence resulting therefrom concerning any other events or transactions is admissible on the issue of guilt or innocence in any other proceeding involving such events or transactions.[337] While these provisions offer an accused a broader range of protections than he might enjoy elsewhere, the "use and derivative use" type of prohibition employed is subject to the same infirmities previously discussed regarding the immunity statutes.

The problem remains, however, in the vast majority of jurisdictions which do not prohibit the medical expert from testifying about those things disclosed to him by the accused in the course of the compelled mental examination, of how to prevent the highly prejudicial evidence from reach-

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[336]Ariz. R. Crim. P. 11.7b(1)(1973). The accused may, however, waive this protection. Id.

[337]Ariz. R. Crim. P. 11.7b(2) (1973). Here, no waiver is specified.

ing the jury.[338] A number of states have attempted to deal with this problem through the device of a bifurcated trial. Although at one time this procedure was available in five states, this number has recently been reduced to three.[339] In all of these jurisdictions a bifurcated trial is prescribed by statute. California's procedure is to hold an initial trial on the issue of guilt or innocence in all cases where the accused enters a plea of "not guilty by reason of insanity," and he joins this plea with another plea or pleas.[340] If the jury finds him guilty, he is then tried on the responsibility issue before the same or a dif-

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[338]Most appellate courts do not consider this to be a problem, insisting that juries can and do properly follow the court's instructions where evidence is admitted for a limited purpose. See e.g., State v. Whitlow, 45 N.J. 3, 210 A.2d 763, 773 (1965).

[339]Arizona's former statute was declared unconstitutional under the due process clauses of both the state constitution and the Fourteenth Amendment. See Shaw v. State, 106 Ariz. 103, 471 P.2d 715 (1970), cert. denied, 400 U.S. 1009 (1970). The statute provided for an initial determination by the trier of fact of the guilt issue and the court reasoned that one who is not mentally responsible at the time of the offense cannot be found guilty of that offense. Id. 471 P.2d at 721. In Texas the legislature has seen fit to abandon the statutory authority for a bifurcated trial. See Tex. Code Crim. P. art. 46.02, § 1, Interpretative Comment (Supp. 1972-1973).

[340]Cal. Pen. Code Ann. § 1026 (Deering, 1970).

ferent jury, at the court's discretion.[341] Where the second trial is heard by the same jury the prejudicial effect of the medical expert's testimony would seem to be no different from situations where unitary trial procedures are utilized; in both cases, in that the insanity issue is tried at the outset, this appears to duplicate the fatal flaw observed by the Arizona Supreme Court in its state statute,[342] although no California court has so ruled. In Colorado, where the accused defends on the issue of mental responsibility, this issue is decided at the outset by a different jury from that which will hear the case respecting guilt or innocence in the event the accused is found to be sane.[343] While this procedure does serve to insulate the defendant at trial from the prejudicial use of his compelled utterances, it inevitably produces added expense and judicial inefficiency. The procedure in Wisconsin, where the accused joints the insanity plea with a plea of not guilty, is identical with the California approach except that the same jury decides both issues. Thus it is subject to the same faults

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[341] Id.

[342] See note 339 supra.

[343] Colo. Code Crim. P. ch. 44, § 39-8-104 (1972). There is no provision for joinder of pleas.

as both the Colorado statutory prescription and the defunct Arizona statute.[344] Wisconsin, though, has an alternative procedure which is not without merit. When an accused raises only the insanity plea, without joining with it another plea or pleas, he thereby is deemed to have admitted all the essential elements of the offense charged, thus effectively pleading guilty.[345] The underlying rationale is that it is believed that this approach will eliminate needless trials on the issue of whether the accused did, in fact, commit the offense, since, in nearly all cases where an issue of mental responsibility is raised, there is no dispute that the accused committed the act.[346] Of course the validity of this procedure would depend upon an absence of a competency issue raised prior to or at trial.[347] If no such issue is involved, the court or a single jury could decide the issue of mental responsibility without the attendant prejudicial effect of the accused's compelled

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[344] See note 339 supra. The Wisconsin Supreme Court has rejected the rationale of the Arizona Supreme Court enunciated in the Shaw case. See State v. Hebard, 50 Wis. 2d 408, 184 N.W. 2d 156 (1971).

[345] See Wis. Stat. Ann. § 971.06 (1971).

[346] See Wis. Stat. Ann. § 971.06, Comment (1971).

[347] Cf. Shaw v. State, 106 Ariz. 103, 471 P.2d 715, 721 (1970).

utterances bearing on the issue of guilt. And such a procedure would square with the judicially approved concept of allowing one to plead guilty, irrespective of guilt, in order to mitigate punishment.[348]

Thusfar only mental examinations compelled by state authority have been considered. Of equal importance are similar examinations mandated by federal law applicable to both the federal district court system and trial courts in the District of Columbia. Although there are two different statutes involved, it is clear that, insofar as there is a repugnancy or inconsistency between the two, the provisions of the United States Code will prevail.[349] Under one statute the issue of mental condition may be raised after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation[350]; the other statute is predicated upon arrest, indictment, or the initiation of any criminal charge.[351] In either jurisdiction the issue

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[348] See, e.g., North Carolina v. Alford, 400 U.S. 25 (1970).

[349] United States v. Jordan, 109 F. Supp. 528 (D.D. C. 1953), aff'd, 207 F.2d 28 (D.C. Cir. 1953).

[350] 18 U.S.C. § 4244 (1970).

[351] D.C. Code Ann. § 24-301 (1967).

may be raised by the prosecutor, defense counsel, or the judge according to a probable cause standard.[352] While both statutes appear on their face to apply only to a determination of competency, they have been judicially interpreted to cover situations where responsibility is an issue.[353] Since there is no provision under federal law whereby an accused is permitted to enter a plea of "not guilty by reason of insanity" both the matter of competency and responsibility are properly raised by appropriate motion prior to trial.[354] Once the issue has been raised, the trial judge is empowered to have the defendant committed to a hospital for a reasonable period of time in order that he may be examined by at least one qualified psychiatrist.[355] Although both statutes are phrased in such a way as to indicate that an accused might be allowed to refuse to be ex-

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[352] See 18 U.S.C. § 4244 (1970); D.C. Code Ann. § 24-301 (1967). See also Winn v. United States, 270 F.2d 326 (D.C. Cir. 1959), cert. denied, 365 U.S. 848 (1960).

[353] See e.g., United States v. Moody, 462 F.2d 694 (5th Cir. 1972); Brown v. United States, 331 F.2d 822 (D.C. Cir. 1964).

[354] See Fed. R. Crim. P. 12; 18 U.S.C. § 4244 (1970).

[355] 18 U.S.C. § 4244 (1970); D.C. Code Ann. § 24-301 (1967). It has been held that the power to commit is not unconstitutional. See Greenwood v. United States, 350 U.S. 366 (1956).

amined, there is authority for the proposition that he must comply with the judicial order.[356] And by submitting there is no violation of his constitutional right against self-incrimination.[357] Even though such an accused has no absolute right to be examined by a psychiatrist of his own choice, as well as by the court-appointed one,[358] this should be allowed[359] even to the extent of furnishing an indigent accused with a free psychiatric examination on the basis of the provisions of another federal statute.[360] While the general rule is that neither the accused's psychiatrist nor the defense attorney is permitted to be present

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[356] See United States v. Weiser, 428 F.2d 932 (2d Cir. 1969), cert. denied, 402 U.S. 949 (1971); United States v. Muncaster, 345 F. Supp. 970 (M.D. Ala. 1972); Battle v. Cameron, 260 F. Supp. 804 (D.D.C. 1966).

[357] See e.g., United States v. Muncaster, 345 F. Supp. 970 (M.D. Ala. 1972); Battle v. Cameron, 260 F. Supp. 804 (D.D.C. 1966). Both cases proceed upon the theory that this is an examination of the body and thus non-testimonial in nature, thereby making the privilege inapplicable.

[358] Perry v. United States, 347 F.2d 813 (D.C. Cir. 1964), cert. denied, 383 U.S. 959 (1965).

[359] Green v. United States, 349 F.2d 203 (D.C. Cir. 1965).

[360] See e.g., United States v. Schappel, 445 F.2d 716 (D.C. Cir. 1970); United States v. Taylor, 437 F.2d 371 (4th Cir. 1971). Both cases rely upon the language of 18 U.S.C. § 3006A (1970). See also Davis v. United States, 413 F.2d 1226 (5th Cir. 1969).

during the course of the court-ordered examination,[361] there is authority holding that this should be allowed, at least where the examining government psychiatrist voices no objection.[362] Both statutes require the submission of a written report subsequent to the conclusion of the mental examination, such report being open to inspection and copying by both the prosecutor and defense counsel[363]; however, the report is not admissible as evidence during the ensuing judicial proceedings.[364]

Once the mental examination has been completed and the psychiatrist's report submitted, the procedure to be followed depends upon whether the underlying issue relates

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[361] See e.g., United States v. Fletcher, 329 F. Supp. 160 (D.D.C. 1971).

[362] See e.g., United States v. Albright, 388 F.2d 719 (4th Cir. 1968); United States v. Bohle, 445 F.2d 54 (7th Cir. 1971). But see United States ex rel. Wax v. Pate, 409 F.2d 498 (7th Cir. 1969) holding that a psychiatric examination was not a "critical stage" within the meaning of United States v. Wade, 388 U.S. 218 (1967) and therefore the presence of counsel is not required. See also United States v. Smith, 436 F.2d 787 (5th Cir. 1971), cert. denied, 402 U.S. 976 (1971).

[363] See In Re Harmon, 425 F.2d 916 (1st Cir. 1970); United States v. Carr, 437 F.2d 662 (D.C. Cir. 1970), cert. denied, 401 U.S. 920 (1971); Fed. R. Crim. P. 16(a)(2), (c).

[364] See e.g., Coffman v. United States, 290 F.2d 212 (10th Cir. 1961).

to competency or responsibility. If the former is involved, under the provisions of both statutes this issue is decided by the court at a pre-trial hearing.[365] Where the issue of responsibility requires resolution the usual practice is to submit the issue to the jury in a unitary trial in conjunction with the issue of guilt or innocence.[366] In such a case the same problems arise as were seen to exist with similar statutes on the state level. The statute which is applicable to the federal district court system provides that no statement compelled from the accused during the course of a mandatory mental examination is admissible against him in evidence on the issue of guilt in any criminal proceeding[367] and this provision has been held to apply to the District of Columbia.[368] Where a unitary trial is held, the prejudice to the accused, despite limiting jury

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[365] See 18 U.S.C. § 4244 (1970); D.C. Code Ann. § 24-301 (1967). Under the provisions of the D.C. Code if the psychiatrist's report indicates that the accused is incompetent and neither the prosecutor nor the defense attorney objects, the judge may rule on the basis of the contents of the report; if an objection is made, the judge decides the matter at a pre-trial hearing.

[366] See, e.g., McIntosh v. Pescor, 175 F.2d 95 (6th Cir. 1949); Harried v. United States, 389 F.2d 281 (D.C. Cir. 1967).

[367] 18 U.S.C. § 4244 (1970).

[368] Edmonds v. United States, 260 F.2d 474 (D.C. Cir. (1958).

instructions, of the psychiatric testimony given on the responsibility issue is well recognized.[369] To remedy this situation federal appellate courts have created the possibility of a bifurcated trial, at least where there is an initial claim by the attorney representing the accused that there exist in the case possible defenses other than lack of mental responsibility.[370] The proper procedure to be followed in this event is for the defense attorney to move the court for bifurcation at the outset of the trial; if granted via judicial discretion, the course to be taken would require that the issue of guilt be adjudicated first, followed by the issue of responsibility, which would be determined by the same jury.[371] However, this ignores the the due process argument which militates against the legality of a finding of guilty as respects acts committed while the actor was not mentally responsible,[372] although the accused will be protected from undue prejudice unless the psy-

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[369] See e.g., Holmes v. United States, 363 F.2d 281, 282 (D.C. Cir. 1966).

[370] See, e.g., United States v. Grimes, 241 F.2d 1119 (D.C. Cir. 1969).

[371] See e.g., Holmes v. United States, 363 F.2d 281, 283 (D.C. Cir. 1966).

[372] See note 339 supra.

chiatrist's testimony is admitted during the "guilt" phase because it is viewed by the court as relating to the accused's intent as well as, or instead of, his mental responsibility.[373] Whatever resolution obtains with respect to these issues it is clear that, once compelled to speak, the accused has no protection from the use against him of his own statements and evidence derived therefrom either at the same trial by the prosecution for rebuttal or impeachment, or similar use at a later trial of the same case, or use, at another trial involving different crimes, of these statements as well as evidence derived therefrom.[374]

These dangers lie hidden in yet another separate and distinct, although similar, set of statutory provisions. Such provisions apply to the so-called sexually psychopathic offender[375] and exist in twenty-five states and the District of Columbia. There appear to be two underlying purposes for such enactments, both predicated upon the public good and the need to cope, on an individual basis, with

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[373] See e.g., Holmes v. United States, 363 F.2d 281, 283 n. 7 (D.C. Cir. 1966).

[374] Cf. notes 334-337 supra and accompanying text.

[375] See note 260 supra.

the person who is mentally ill: first, the protection of society via the method of individual detention so as to alleviate the danger which he poses, and second, the enunciated goal of treatment and ultimate rehabilitation of the offender.[376] Almost one-half of these statutes apply to individuals who have been convicted of a sex offense regardless of their past or present mental state.[377] Slightly less than one-third condition their operation on the individual being charged with or convicted of a sexual offense and presently thought to have a mental disorder, short of making him criminally irresponsible, such mental disorder being coupled with criminal propensities to commit sex offenses.[378] Two other states add to this the require-

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[376] See 41 Am. Jur. 2d, Incompetent Persons §§ 49-54 (1968); Annot., 34 A.L.R. 3d 652, § 2 at 661 (1970).

[377] Colo. Code Crim. P. ch. 44, § 39-13-202(3)(1972); Conn. Gen. Stat. Ann. § 17-244(a)(1958); Md. Code Ann. art. 31B, § 5 (1957); N.J. Stat. Ann. § 2A:164-3 (1971); Ohio Rev. Code Ann. § 2947.25 (Supp. 1972); Pa. Stat. Ann. tit. 19, § 1166 (1964); Tenn. Code Ann. § 33-1301 (Supp. 1972); Utah Code Ann. § 77-49-1 (Supp. 1973); W.Va. Code Ann. § 27-6A-1 (1971); Wis. Stat. Ann. § 975.01 (1971); Wyo. Stat. Ann. § 7-348(a) (Supp. 1973).

[378] Ala. Code Ann. tit. 15, § 434 (Supp. 1971); Cal. Wel. & Inst. Code Ann. § 6300 (Deering, 1969); Ind. Acts ch. 3.1, § 1 (P.L. No. 452, 1971); Neb. Rev. Stat. Ann. § 29-2901 (Supp. 1971); N.H. Rev. Stat. Ann. §§ 173-A:2, 3I (Supp. 1973); Vt. Stat. Ann. tit. 18, §§ 8501(a), 8504 (Supp. 1973); Wash. Rev. Code Ann. §§ 71.06.020, .030 (Supp. 1972).

ment that the mental disorder shall be thought to have existed for a fixed period of time.[379] Three states merely require that there is a criminal charge pending and that there is coupled with an apparent mental disorder a propensity to commit sex offenses.[380] Three other jurisdictions provide that the respective statute applies to one who is not presently mentally ill and who, by a course of repeated misconduct in sexual matters, has evidenced such lack of power to control his sexual impulses as to be dangerous to others.[381] In all these jurisdictions any rights regarding self-incrimination which the subject individual may have depends directly upon the characterization of the statutory provisions. Eight state statutes have been judicially denominated as civil, thus foreclosing the self-incrimination issue.[382] Two others, on their face, are

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[379] Fla. Stat. Ann. § 917.14 (1972); Iowa Code Ann. § 225A.1 (1969).

[380] Ill. Stat. Ann. §§ 105-1.01, -3 (1970); Mass. Gen. L. Ann. ch. 123 A, §§ 1, 3 (1969); Mo. Stat. Ann. §§ 202.700, .710.1 (1972).

[381] D.C. Code Ann. § 22-3503 (1967); Minn. Stat. Ann. § 526.09 (1969); Ore. Rev. Stat. Ann. § 426.510 (1971-1972). A similar statute has been upheld as not being so vague and indefinite so as to be unconstitutional. See Pearson v. Probate Court, 309 U.S. 270 (1940).

[382] See State ex rel. Haskett v. Marion County Criminal Court, 250 Ind. 229, 234 N.E. 2d 636 (1968), cert. denied,

civil in nature.[383] Three statutes provide for contempt sanctions against uncooperative individuals who are subject to their terms.[384] Judicial interpretation has directly held in one state[385] and impliedly held in another[386] that the respective statute was criminal in nature and thus the privilege against self-incrimination here is applicable to sexual psychopaths proceedings.[387] The Supreme Court has been less than helpful as respects a definitive resolution of this problem. Specifically, it has

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393 U.S. 888 (1968); State ex rel. Sweezer v. Green, 360 Mo. 1249, 232 S.W. 2d 897 (1950); People v. Lopez, 1 Cal. 3d 672, 82 Cal. Reptr. 121 (1969); State ex rel. Fulton v. Sheetz, 166 N.W. 2d 874 (Iowa, 1969); Wood v. Director of Patuxent Inst., 243 Md. 731, 223 A.2d 175 (1966); Meola v. Fitzpatrick, 322 F. Supp. 878 (D. Mass. 1971); State v. Labor, 128 Vt. 597, 270 A.2d 154 (1970); Sevigny v. Burns, 108 N.H. 95, 227 A.2d 775 (1967).

[383] Fla. Stat. Ann. § 917.24 (1972); Ill. Stat. Ann. § 105-3.01 (1970).

[384] D.C. Code Ann. § 22-3506(a)(1967); Fla. Stat. Ann. § 917.17 (1972); Ore. Rev. Stat. Ann. § 426.610(1) (1971-1972).

[385] Commonwealth v. Dooley, 209 Pa. Super. 519, 232 A.2d 45 (1967).

[386] State v. Horne, 105 N.J. Super. 297, 252 A.2d 47 (1969).

[387] It is also applicable in two states where, although they deemed the statute civil in nature, the respective courts held the privilege to apply. See People v. English, 31 Ill. App. 2d 301, 201 N.E. 2d 455 (1964); Sevigny v. Burns, 108 N.H. 95, 227 A.2d 775 (1967).

backed away from answering the question of whether or not this type of procedure gives rise to the privilege as well as the right to counsel.[388] The Court also side-stepped the issue of whether a patient rightfully withheld, on Fifth Amendment grounds, cooperation in a court-ordered psychiatric examination to determine a disposition other than sentencing for a criminal conviction.[389] However, the Court has held that whether such sexual psychopath proceedings are classified as civil or criminal they are subject to the provisions of the Fourteenth Amendment.[390] It has also held that the Fifth Amendment's privilege against self-incrimination is applicable to the states via the Fourteenth Amendment.[391] Ergo, the result should be obvious. And this result would be consistent with other decisions where similar protections were seen as being necessary in non-criminal proceedings.[392]

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[388] See Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972) where the Court dismissed the writ of certiorari as being improvidently granted.

[389] See McNeil v. Director of Patuxent Inst., 407 U.S. 245 (1972).

[390] Specht v. Patterson, 386 U.S. 605, 608 (1967).

[391] Malloy v. Hogan, 378 U.S. 1 (1964).

[392] See e.g., Mathis v. United States, 391 U.S. 1 (1968) (income tax investigation); In re Gault, 387 U.S. 1 (1967) (juvenile matters).

However, the fact remains that individuals are still compelled to speak to court-appointed psychiatrists when the issue of sexual psychopathy is raised. This becomes more significant when it is realized that almost anyone can set the statutory machinery in motion. In the overwhelming majority of jurisdictions the prosecutor, as well as the court, may initiate action involving a mandatory medical examination where it appears that the individual is a sexual psychopath.[393] Any responsible person may accomplish the same thing in two other states.[394] Once this has been done, the usual procedure is to have the individual committed for examination by one or more psychiatrists[395] for periods varying between thirty and ninety days.[396] Upon completion of this examination a written report is universally mandated. In over half the jurisdictions the only requirement is that

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[393] See e.g., D.C. Code Ann. § 22-3504(a) (1967); Fla. Stat. Ann. § 917.14 (1972); Cal. Wel. & Inst. Code Ann. § 6302 (1969).

[394] See Iowa Code Ann. § 225A.2 (1969); Mo. Stat. Ann. § 202.710.2 (1972).

[395] See e.g., Conn. Gen. Stat. Ann. § 17-244 (1958); Mass. Gen. L. Ann. ch. 123A, § 4 (1969); N.H. Rev. Stat. Ann. § 173-A:3I (Supp. 1973).

[396] See e.g., Colo. Code Crim. P. ch. 44, § 39-13-207 (3) (1972); Ohio Rev. Code Ann. § 2947.25 (Supp. 1972); Wis. Stat. Ann. § 975.04 (1971).

the report be filed with the court[397]; in the remaining states the defense counsel is affirmatively granted access to this document.[398] Such access is indeed necessary in light of the fact that in only two states can the defense counsel or the psychiatrist of the patient's choice be present during the psychiatric examination.[399] The report is admissible in evidence on the sole issue of sexual psychopathy in three states,[400] inadmissible for this purpose in two others,[401] and inadmissible in one state in any criminal proceeding other than the one to determine sexual psychopathy unless it is requested for use by the defense.[402]

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[397] See e.g., Neb. Rev. Stat. Ann. § 29-2902(4) (Supp. 1971); Pa. Stat. Ann. tit. 19, § 1167 (1964); Utah Code Ann. § 77-49-3 (1953).

[398] See e.g., D.C. Code Ann. § 22-3506(b) (1967); Ill. Stat. Ann. § 105-4 (1970); Ore. Rev. Stat. Ann. § 426.610(3) (1971-1972). One state apparently affirmatively precludes access by defense counsel. See Fla. Stat. Ann. § 917.22 (1972).

[399] See Ind. Acts. ch. 3.1, § 7 (P.L. No. 452, 1971) (defense counsel); Neb. Rev. Stat. Ann. § 29-2902(6) (Supp. 1971).

[400] Colo. Code Crim. P. ch. 44, § 39-13-210(6) (1972); Fla. Stat. Ann. § 917.17 (1972); N.H. Rev. Stat. Ann. § 173-A:4I (Supp. 1973).

[401] Iowa Code Ann. § 225A.10 (1969); Mo. Stat. Ann. § 202.720.4 (1972).

[402] Ind. Acts. ch. 3.1, § 9 (P.L. No. 452, 1971).

This latter minimal protection is broadened in only two jurisdictions, both of which include the additional prohibition that no evidence resulting from the personal examination of the patient shall be admissible against him in any judicial proceedings other than ones to determine the issue of sexual psychopathy.[403] Conspicuously absent in the overwhelming majority of jurisdictions are provisions aimed at protecting the patient from the use of his testimony and evidence derived therefrom for any purpose at any subsequent trial for any offense.[404]

Such provisions probably would be necessary even if all jurisdictions would follow the lead of those few states which have seen fit to depart from the traditional view that the privilege against self-incrimination does not apply to mandatory mental examinations. New Jersey courts have indicated that the privilege is fully applicable where sexual psychopathy is at issue[405] and where, although he may raise the issue of either competency or responsibility, he does not attempt to offer his own psychiatric evidence to

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[403] D.C. Code Ann. § 22-3506(b) (1967); Ore. Rev. Stat. Ann. § 426.610(3) (1971-1972).

[404] Cf. note 374 supra and accompanying text.

[405] State v. Horne, 105 N.J. Super. 297, 252 A.2d 47 (1969).

support his position.[406] Pennsylvania has held the privilege applicable to all three classes of mental examinations.[407] Courts in three states have held the privilege to apply where either or both competency and responsibility form the focal point of the examination[408]; two others limit the applicability of the privilege to sexual psychopathy situations.[409] However, even if the privilege were universally accepted as being applicable in all situations involving mandatory mental examinations, nothing substantial would seem to stand in the way of the various legislative bodies' efforts to circumvent the exercise of that privilege by passing laws similar to the immunity statutes previously considered.[410] In fact, three such statutes are already in existence.[411] Thus, whether deprived of the privilege

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[406] State v. Obstein, 52 N.J. 516, 247 A.2d 5 (1968).

[407] Commonwealth v. Dooley, 209 Pa. Super. 519, 232 A.2d 45 (1967); Commonwealth v. Pomponi, 284 A.2d 708 (Pa. 1971).

[408] French v. District Court, 153 Colo. 10, 384 P.2d 268 (1963); State.v. Olson, 274 Minn. 225, 143 N.W. 2d 69 (1966); Shepard v. Bowe, 250 Ore. 288, 442 P.2d 238 (1968).

[409] People v. English, 31 Ill. App. 2d 301, 201 N.E. 2d 455 (1964); Sevigny v. Burns, 108 N.H. 95, 227 A.2d 775 (1967).

[410] See Kastigar v. United States, 406 U.S. 441 (1972); Zicarelli v. United States, 406 U.S. 472 (1972).

[411] Ariz. R. Crim. P. 11.7 (1973); D.C. Code Ann.

entirely or allowed to claim a severely emasculated one, an individual forced to undergo a mandatory mental examination stands in much the same position as his counterpart who faces an inquisition conducted by a grand jury, legislative committee, or administrative agency, or trial on a criminal charge subsequent to illegal police activity.[412] And again testimony is compelled with the speaker being the only one required to pay the price.

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§ 22-3506(b) (1967); Ore. Rev. Stat. Ann. § 426.610(3) (1971-1972).

[412] See Harris v. New York, 401 U.S. 222 (1971); Simmons v. United States, 390 U.S. 377 (1968); McGautha v. California, 402 U.S. 183 (1971).

CHAPTER V.

STATEMENTS COMPELLED BY MANDATORY DISCLOSURE STATUTES

Thusfar, statutes which impose an obligation to speak, under threat of the enforcement of a penalty for noncompliance, upon certain individuals have been discussed. A related consideration involves situations wherein the statutory law of a particular jurisdiction requires that in specific instances enumerated reports, declarations, applications, and registration forms be submitted to one or more governmental agencies. The significance of these disclosure requirements is enhanced with the realization that, once in control of the government, the information divulged is, as a general rule, admissible against the maker in criminal prosecutions.[413] While such disclosure

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[413] See 22A C.J.S. Criminal Law § 654 (1961). See also 58 Am. Jur. Witnesses §§ 72-74 (1948); 98 C.J.S. Witnesses § 448 (1957).

is most aptly deemed to be testimonial in nature[414] possible collisions with the privilege against self-incrimination have, in the main, been avoided by way of the judicial fictions of unprivileged public documents, public property interest, or implied waiver, all of which have been severely criticized.[415] The requirements have been viewed as being valid and lawfully extending to anyone who engages in any activity, occupation, profession or calling which is governed by legislation regulating the undertaking and requiring disclosure, either oral or written.[416] Over the years some areas of endeavor have, to a much larger degree than others, attracted legislative attention and the result has been the attendant promulgation of laws which require the revelation of information which is likely to form the basis of a criminal indictment or prosecutorial information. These include the submission of data respecting individual earned income, wagering activities, pursuits involving fire-

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[414] See McCormick, Evidence § 142 at 300 (2d ed. 1972).

[415] See 8 Wigmore, Evidence § 2259(c) at 364-365 (McNaughton rev. 1961).

[416] Model Code of Evidence rule 207(1)(1942); Uniform Rules of Evidence rule 25(e)(1953). The underlying rationale is attributed to the alleged trend of modern authorities. See Uniform Rules of Evidence rule 25(e), Commissioner's Note (1953).

arms and alcoholic beverages, and the operation of motor vehicles. In that the income-related statutes are perhaps the best known and susceptible of the widest application they will be subjected to initial analysis.

The federal income tax legislation is broad in scope and possessed of characteristics which combine annually to cast an expansive net to ensnare millions of individuals. There exists the requirement that an income tax return be filed by every individual having a gross income of $750.00 or more for the taxable year.[417] By gross income is meant all income from whatever source derived.[418] The power of the federal government to levy such taxes is beyond question[419] and since the tax is not a sanction against wrongdoing, it does not concern itself with the nature of the income which it taxes.[420] In addition to the basic annual filing requirement, every individual is required to file a declaration of estimated tax for the next

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[417] 26 U.S.C. § 6012 (1970). Certain higher limits are set for unmarried taxpayers and married individuals who occupy the same residence at the close of the taxable year. Id.

[418] 26 U.S.C. § 61 (1970).

[419] See Brushaber v. Union Pacific R.R., 240 U.S. 1 (1916).

[420] See e.g., C.I.R. v. Tellier, 383 U.S. 687 (1966).

succeeding taxable year if such taxpayer comes within certain gross income parameters and receives gross income from sources other than wages which exceeds $500.00; however this declaration need not be filed if the estimated tax can reasonably be expected to be less than $40.00.[421] Rates of taxation vary between 14 and 70 per cent according to a graduated scale.[422] No one whose gross income exceeds the statutory amount is exempt from the filing requirement and penalties are prescribed for those who either fail to file a return, keep income records, supply information, or pay the tax which is due.[423] Additional penalties attach, as well as the imposition of interest due, where there has been a failure to file a tax return,[424] a failure to pay the tax,[425] or a failure to pay the estimated tax.[426] Further, inspection of federal income tax returns, including declarations of estimated

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[421] 26 U.S.C. § 6015 (1970).

[422] 26 U.S.C. § 1 (1970).

[423] 26 U.S.C. § 7203 (1970).

[424] 26 U.S.C. § 6651 (1970).

[425] 26 U.S.C. § 6653 (1970).

[426] 26 U.S.C. § 6654 (1970).

tax, is permitted by any official, body, or commission lawfully charged with the administration of any state tax law.[427] This is bound to have far-reaching ramifications when it is realized that the legislatures of forty states have seen fit to impose an income tax on their respective citizens.[428] Many of these taxation statutes provide a filing

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[427] 26 U.S.C. § 6103 (1970). These records are also available upon request to the Committee on Ways and Means of the House, the Committee on Finance of the Senate, the Joint Committee or a select committee of the Senate or House specifically authorized to investigate returns by a resolution of the Senate or House or by both, concurrently. Id.

[428] Ala. Code Ann. tit. 51, § 394 (1958); Alaska Stat. Ann. § 43.20.030 (1962); Ariz. Rev. Stat. Ann. § 43-101 (Supp. 1973-1974); Ark. Stat. Ann. § 84-2003 (Supp. 1971); Cal. Rev. & Tax. Code Ann. § 18401 (Deering, Supp. 1973); Colo. Rev. Stat. Ann. § 138-1-2 (1964); Del. Code Ann. tit. 30, § 1101 (1953); Ga. Code Ann. § 92-3101 (Supp. 1972); Ha. Rev. Stat. Ann. § 235-4 (Supp. 1972); Idaho Code Ann. § 63-3024 (Supp. 1973); Ill. Stat. Ann. ch. 120, § 2-201 (Supp. 1973-1974); Ind. Stat. Ann. tit. 6, Art. 2, § 1-1 (Burn's 1972); Iowa Code Ann. § 422.4 (1971); Kan. Stat. Ann. § 79-3220 (Supp. 1972); Ky. Rev. Stat. Ann. § 141.180 (1969); La. Rev. Stat. Ann. § 47:31 (1970); Me. Rev. Stat. Ann. tit. 36, § 5111 (Supp. 1973); Md. Code Ann. art. 81, § 288 (1957); Mass. Gen. L. Ann. ch. 62, § 22 (Supp. 1973); Minn. Stat. Ann. § 290.03 (1962); Miss. Code Ann. § 27-7-5 (1972); Mo. Stat. Ann. § 143.011 (Supp. 1973); Mont. Rev. Code Ann. § 84-4902 (Supp. 1973); Neb. Rev. Stat. Ann. § 77-2715 (1943); N.H. Rev. Stat. Ann. § 77:3 (1964); N.M. Stat. Ann. § 72-15-1 (1953); N.Y. Cons. Tax. L. § 367 (McKinney, 1966); N.C. Gen. Stat. Ann. § 105-136 (1971); N.D. Cent. Code Ann. § 57-38-02 (1972); Ohio Rev. Code Ann. § 5747.02 (1973); Okla. Stat. Ann. § 2355 (Supp. 1973-1974); Ore. Rev. Stat. Ann. § 316.037 (1971-1972); Pa. Stat. Ann. tit. 72, § 7302 (Supp. 1973-1974); R.I. Gen. L. Ann. § 44-30-51 (Supp. 1972); S.C. Code L. Ann. § 65-221 (1962); Utah Code Ann.

requirement where gross income exceeds a stated amount[429]; others merely provide for filing in each case where the individual is required to file a federal income tax return.[430] Some provide for the taxation of non-residents where income is derived from the taxing state.[431] Rates of taxation are predicated upon either a graduated scale[432] or a flat percentage.[433] All of these statutes have provisions for the imposition of interest and penalties for for failure to file a return or pay the tax.[434] Many expressly provide for the exchange of information either with

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§ 59-14-16 (1953); Vt. Stat. Ann. tit. 32, § 5822 (1970); Va. Code Ann. § 58-101 (1950); W. Va. Code Ann. § 11-21-3 (1966); Wis. Stat. Ann. § 71.01 (1969).

[429] See e.g., Del. Code Ann. tit. 30, § 1101 (1953); Idaho Code Ann. § 63-3024 (Supp. 1973); Mass. Gen. L. Ann. ch. 62, § 22 (Supp. 1973).

[430] See e.g., Alaska Stat. Ann. § 43.20.030 (1962).

[431] See e.g., Miss. Code Ann. § 27-7-5 (1972); S.C. Code L. Ann. § 65-221 (1962); Vt. Stat. Ann. tit. 32, § 5822 (1970).

[432] See e.g., Ariz. Rev. Stat. Ann. § 43-101 (Supp. 1973-1974); Ga. Code Ann. § 92-3101 (Supp. 1972); Md. Code Ann. art. 81, § 288 (1957).

[433] See e.g., Minn. Stat. Ann. § 290.03 (1962); Mont. Rev. Code Ann. § 84-4902 (Supp. 1973); N.H. Rev. Stat. Ann. § 77:3 (1964).

[434] See e.g., Colo. Rev. Stat. Ann. § 138-1-37 (1964); Iowa Code Ann. § 422.25 (1971); Me. Rev. Stat. Ann. tit. 36, § 5273 (Supp. 1973).

the federal government,[435] or the governments of other states[436] on a reciprocal basis. Under such a profusion of interrelated legislation most taxpayers survive a lifetime free of all hazards save the relinquishment of tax dollars. Others have found themselves on the horns of a dilemma precipitated by the manner in which they obtained the income upon which the tax is based. Inevitably, these individuals could not comply with income tax reporting requirements for fear of revealing conduct deemed to be criminal under other federal and state law. When this occurs, the self-incrimination clause of the Fifth Amendment often seems a likely refuge.

The Supreme Court faced just such an issue over twenty years ago in United States v. Kahriger.[437] There the appellee was convicted in federal court for his alleged willful failure to register as a person engaged in the business of accepting wagers and his failure to pay an occupational tax in violation of applicable provisions of federal income tax law. He subsequently leveled a two-pronged attack on the legislation: (1) Congress, under the guise of

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[435] See e.g. Mass Gen. L. Ann. ch. 62, § 58 (1969).

[436] See e.g., N.M. Stat. Ann. § 72-15-1 (1953).

[437] 345 U.S. 22 (1953).

its taxing power, in essence sought to regulate intrastate gambling activities thereby infringing the police power reserved to the states, and (2) the registration provisions violated his privilege against self-incrimination. The five-man majority opinion dispatched the initial contention by indicating that the tax involved applied to all engaged in the business of receiving wagers irrespective of whether such activity violated state law, any suggested legislative history alluding to the suppression of gambling activities was not determinative, and, that since the primary purpose of the statutes in question was the constitutionally valid exercise of Congress to implement procedures to raise revenue, the fact that this produced an ancillary regulatory effect on certain activity was immaterial.[438] Further, the opinion found the registration requirements, which included the filing of names, addresses, and places of business, to be nothing more than that required under other taxing provisions and merely served to further the government's ability to collect the tax.[439] The Court's approach to the second contention took even less effort. Questioning the appellee's ability to raise the self-incrimination issue in

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[438] 345 U.S. at 26-28.

[439] Id. at 31-32.

light of the fact that he failed to register as required, but assuming that he could nonetheless do so, the majority noted that privilege related only to past, not future, acts and therefore the privilege simply did not apply.[440] Two dissenting opinions were filed in the case. The first noted that the required information, if supplied, could serve as the basis for a federal gambling conviction and that its alternative effect would be to provide a foundation for a state gambling conviction. As such the statute mandates a type of coercion which is incompatible with the Fifth Amendment.[441] The second indicated that Congress had intruded into an area specifically reserved for state action, for the thrust of the legislation was not, as averred by the majority, the raising of revenues but rather the suppression of illegal state gambling practices.[442] Perhaps the key to this decision lies in the sole concurring opinion. Indicating that he would side with the minority if they could render a disposition which would not undercut

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[440] Id. at 32-33.

[441] 345 U.S. 22, 36-37 (1953)(Black and Douglas, JJ., dissenting).

[442] 345 U.S. 22, 38-40 (1953)(Frankfurter, J., dissenting).

Congress' proper use of the taxing power, Justice Jackson viewed the applicability of the privilege against self-incrimination to this type of legislation as opening the door to innumerable instances of taxpayer evasion of reporting requirements; rather, he was confident that remedial legislation would evolve which would more properly be corrective of the then present situation than a questionable precedent established by judicial fiat.[443] Evidently, this respected jurist had misjudged congressional interest and inertia.

Two years later the nucleus Kahriger majority faced a similar issue in Lewis v. United States.[444] The provisions of the same federal statute were attacked, this time, however, on the ground that to have registered as a gambler and paid the special tax alleged to be due would have incriminated appellant under federal law which prohibited gambling. Relying entirely on the Kahriger decision, the majority found the attempted state-federal differentiation unpersuasive, taking pains to indicate that if the petitioner

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[443] 345 U.S. 22, 34-36 (1953)(Jackson, J., concurring).

[444] 348 U.S. 419 (1955). At the time Lewis was decided Chief Justice Vinson and Justice Jackson no longer sat with the Court; the former was replaced by Chief Justice Warren and Justice Harlan had yet to be sworn as a member.

chose to follow an illegal calling this was voluntary, as was his ability to elect or refuse to make the required disclosures and thus any coercive element giving rise to a violation of the Fifth Amendment privilege was absent.[445] Similarly treated was the argument presented by the appellant that to display the required tax stamp indicating that the applicable taxes had been paid would have been an invitation to federal agents' intent on arresting him for gambling violations; the majority's short retort was that since the appellant had not purchased such a stamp he lacked standing to assert his claim.[446] The three Kahriger dissenters remained unconvinced. One indicated that the case at bar merely brought into sharp focus the objectionable qualities previously found to be present in the legislation.[447] The others took the position that now the protection of the Fifth Amendment was weakened to yet a greater degree, for here the very government which required disclosure had the power to utilize the information thereby revealed to convict appellant and others similarly situated of felonious

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[445] 348 U.S. 419, 422-423 (1955).

[446] Id. at 423.

[447] 348 U.S. 419, 425 (Frankfurter, J., dissenting).

offenses.[448] For them a more flagrant affront to the privilege was beyond the pale of comprehension.[449] But for the ensuing dozen years and more the status quo remained.

When the Supreme Court chose to hear the case of Marchetti v. United States[450] there was in existence, as there still are, federal statutes which impose disclosure and related requirements which are strikingly similar to those receiving judicial attention in Kahriger and Lewis. Specifically, a special annual tax is payable by persons engaged in the business of accepting wagers.[451] Each person who is required to pay this special tax is required to file forms which reflect not only his name, places of residence, and business addresses but also those of each person who is engaged in receiving wagers for him or on his behalf.[452] This registration requirement, once fulfilled, and the payment of the tax, entitles the registrant to a federal wagering stamp which must be placed and kept conspicuously in his

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[448] 348 U.S. 419, 424-425 (Black and Douglas, JJ., dissenting).

[449] Id. at 425.

[450] 390 U.S. 39 (1968).

[451] 26 U.S.C. § 4411 (1970).

[452] 26 U.S.C. § 4412 (1970).

business establishment,[453] upon pain of penalty for non-compliance.[454] Additionally, there is imposed upon such individuals a 10 percent excise tax on all wagers placed with them.[455] Ostensibly to facilitate the collection of this excise tax, persons accepting wagers are required to keep daily records of all such transactions,[456] the same being liable to federal inspection as frequently as is deemed necessary.[457] Compliance with these requirements neither makes lawful the activity where otherwise prohibited by federal, state, or municipal law nor precludes punishment for such activity or the imposition of additional taxes by the various states and their respective political subdivisions relative to the wagering activity.[458] This, of course, brings into play myriad state statutes[459]

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[453] 26 U.S.C. § 6808 (1970).

[454] 26 U.S.C. § 7273 (1970).

[455] 26 U.S.C. §§ 4401 (1970).

[456] 26 U.S.C. § 4403 (1970).

[457] 26 U.S.C. § 4423 (1970).

[458] 26 U.S.C. § 4906 (1970); 26 U.S.C. § 4422 (1970).

[459] See 390 U.S. 39, 44 n. 5, 45 n. 6 (1968)(collecting statutes).

as well as federal statutes[460] aimed at the eradication of gambling enterprises.

All of this did not escape judicial scrutiny in Marchetti. There the petitioner was convicted of willful failures to register as a taker of wagers and to pay the special annual wagering tax, and conspiracy to avoid payment of this tax, all in violation of federal tax law. He contended throughout the course of litigation that the registration and tax payment provisions violated his Fifth Amendment right against self-incrimination, and this necessitated a reexamination of the Kahriger and Lewis decisions. Initially, the majority opinion traced the overall scheme of taxation of the special class of taxpayers involved, including the relationship between these provisions and the federal and state prohibitions respecting wagering activity.[461] The conclusion reached was that, under such a broad

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[460] See 18 U.S.C. § 1952 (1970)(travel in interstate commerce with the intent to distribute gambling proceeds); 18 U.S.C. § 1953 (1970)(interstate transportation of wagering paraphernalia); 18 U.S.C. § 1084 (1970)(knowing use of a wire communication facility for interstate transmission of wagering information); 18 U.S.C. § 1955 (1970)(numerous gambling activities prohibited); 18 U.S.C. § 1511 (conspiracy to obstruct state laws with intent to facilitate gambling); 18 U.S.C. § 1301 (interstate transportation of lottery tickets.

[461] 390 U.S. 39, 42-46 (1968).

interlocking statutory scheme, petitioner could not avoid being subjected to federal and state prosecution if he complied with the challenged requirements.[462] Of special significance in this regard was the fact that at the time of appellant's conviction another federal statute required the appropriate federal officials to furnish a list of those who had registered and paid the special tax to both state and federal prosecutors.[463] The Court noted that this information, in conjunction with the federal requirement pertaining to the conspicuous display of the wagering tax stamp, virtually assured conviction of a gambling-related offense,[464] especially in light of acknowledged co-operation between federal revenue officers and prosecutorial

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[462] Id. at 47.

[463] This provision has been subsequently repealed. See Act of Oct. 22, 1968, Pub. L. No. 90-618, 82 Stat. 1235.

[464] 390 U.S. 39, 47-48 (1968). This result is facilitated by statutes in various states which make possession of the federal gambling tax stamp prima facie evidence of illicit state gambling activities. See e.g., Ala. Code Ann. tit. 14, § 302(8) (1958); La. Rev. Stat. Ann. § 15:31 (Supp. 1973). One state continues to require that purchasers of the federal stamp file similar registration forms with state officials. See Ill. Stat. Ann. ch. 38, § 28-4 (Supp. 1973-1974). Apparently, the courts of only one state have found the evidentiary provision invalid on a constitutional basis. See Scaglione v. United States, 396 F.2d 219 (5th Cir. 1968), interpreting Fla. Stat. Ann. § 849.051 (1965).

officials aimed at the suppression of gambling endeavors.[465] The net effect of compliance with the federal registration requirement, the Court observed, would be to furnish a concrete connection between the registrant and illegal activity; under such circumstances the application of the self-incrimination privilege was compelling.[466] And this was so despite the decisions in Kahriger and Lewis. The former was grounded upon a prior opinion[467] which held the privilege inapplicable where the appellant was convicted for failure to file an income tax return because to have held otherwise would have been to expand inappropriately the scope of the privilege thereby enabling the claimant to be the sole judge of the privilege's applicability.[468] The Marchetti Court found such rationale misplaced in the case at bar.[469] Similarly, the majority refused to follow the rationale of Lewis, asserting that the question was not whether appellant had a constitutional right to engage in

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[465] 390 U.S. 39, 48 (1968).

[466] Id. at 48-49.

[467] United States v. Sullivan, 274 U.S. 259 (1926).

[468] Cf. Hoffman v. United States, 341 U.S. 479 (1951).

[469] 390 U.S. 39, 50-51 (1968).

gambling pursuits, but rather whether once so engaged he had a valid claim of privilege.[470] In this regard, reasoned the Court, it was no answer for the government to claim that entering upon a course of illegal conduct waived the privilege or that the privilege applied only to past activities and not to prospective ones, which would be disclosed by registration, since the petitioner faced substantial hazards of prosecution for past, present, and future offenses if he complied with the statutes' commands.[471] Therefore, on the facts of the instant case, petitioner was viewed as having validly asserted the privilege and to the extent that Kahriger and Lewis conflicted with this position they were no longer valid.[472] But this was not dispositive of the full result reached in Marchetti since the government urged two further issues on the Court. First, it was argued that any claim of privilege was nullified by the so-called "required records" doctrine announced in yet another case.[473] That doctrine was held not to apply to the Mar-

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[470] Id. at 51.

[471] Id. at 51-53.

[472] Id. at 54. It should be noted that the court stopped short of a full blown renunciation of both cases. Id.

[473] Shapiro v. United States, 335 U.S. 1 (1948).

chetti factual pattern since all three of the elements of that doctrine were absent in the instant situation.[474] Second, a use and derivative use restriction was suggested as a device to supplant the protection afforded by the privilege, thus obviating the necessity to condemn the legislative provisions.[475] This the Court declined to do, both because of the attendant frustration of an avowed legislative intent to make the required information available to federal and state prosecutors and because of the resulting hardship of requiring state authorities to prove the untaintedness of their trial evidence in cases where state prosecution followed federal registration.[476] Instead, the Court simply ruled that petitioner's claim of privilege was a complete defense to a federal prosecution for failure to register and pay the tax, while hinting that

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[474]Specifically, there was no requirement to keep or preserve records of the same kind ordinarily kept; the records at issue were not imbued with any public aspects; and the requirements of the statutes were directed at a group "inherently suspect of criminal activities," rather than at areas of regulatory and non-criminal activity. 390 U.S. 39, 56-57 (1948). At this juncture the Court removed any doubt that the disclosures would have been testimonial in nature. Id. at 57. See note 414 supra and accompanying text. Cf. note 9 supra.

[475]Cf. Murphy v. Waterfront Commission of New York, 378 U.S. 52 (1964).

[476]390 U.S. 39, 58-59 (1968).

Congress might alter the respective statutes to provide immunity in return for compliance.[477]

The same day that it decided Marchetti the Supreme Court announced its holding in a companion case, Grosso v. United States.[478] The petitioner there, unlike his predecessor, contended only that payment of the federal excise tax imposed on income derived from wagering activity violated his right against self-incrimination. After alluding to the comprehensive scheme involving state and federal efforts which both taxed and prohibited wagering endeavors, the majority also observed that in the case of the federal excise tax under consideration there was also required the filing of a return which called for the production of information similar to that required by the registration form in Marchetti. Further, while there was not a clear legislative command that the information contained in the tax return be submitted to federal and state prosecutors, this procedure was not explicitly barred from such use. Again, the majority concluded that the appellant faced a real and substantial risk of self-incrimination and under these cir-

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[477] Id. at 60. Cf. 8 Wigmore, Evidence § 2259(c) at 367 n. 15 (McNaughton rev. 1961).

[478] 390 U.S. 62 (1968).

cumstances he had raised a valid privilege claim.[479] Such claim could not be defeated by the rationale in Kahriger or Lewis,[480] nor by the "required records" doctrine which, as in Marchetti, was found to be inapplicable.[481] The proper remedy, said the Court, was the raising of an absolute bar to any federal conviction grounded upon the failure to pay the federal excise tax.[482] Only one Justice saw the fallacy in these otherwise sound decisions.[483] He envisaged that, by failing to declare these federal statutes invalid on constitutional grounds and suggesting that correctional legislation be enacted such as would grant immunity from prosecution in return for the submission of desired information, the Court was opening the door to an entire abrogation of the privilege.[484] As will be seen, this apprehension has nearly been proven to be well founded. However, other matters require prior consideration.

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[479] Id. at 66-67.

[480] Id. at 67.

[481] Id. at 67-69.

[482] Id. at 69 n. 7.

[483] The concurring opinion filed by Justice Brennan applied to both Marchetti and Grosso. See 390 U.S. 39, 61 (1968).

[484] 390 U.S. 62, 72-73 (1968)(Brennan, J., concurring).

Statutes similar to those of federal and state origin which apply to taxation and prohibition of gambling activity may be found where the enterprise centers on the manufacture, distribution, and sale of alcoholic beverages. In this regard, while attaching criminal penalties for non-compliance, federal statutes promulgate numerous reporting and associated requirements. Records are required to be kept and returns made by every person disposing of any substance of the character used in the manufacture of distilled spirits or the disposing of denatured distilled spirits or the articles from which distilled spirits may be recovered, such records to be made available to any federal revenue officer during business hours.[485] Persons having possession, custody, or control of any distilling apparatus must file a written statement disclosing the location, kind, capacity, and owner of such device, as well as his residence and the purpose for which the apparatus has been or is intended to be used.[486] All distilled spirits must bear federal alcohol tax stamps.[487] Individuals engaged in distilling, bonded warehousing, rectifying, or bottling dis-

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[485] 26 U.S.C. § 5291 (1970).

[486] 26 U.S.C. § 5179 (1970).

[487] 26 U.S.C. §§ 5205, 5604 (1970).

tilled spirits must conspicuously place a sign outside their place of business indicating the name of the owner and the business in which engaged[488]; further, they must keep such records and submit such reports as are required by the Secretary of the Treasury, these records and reports being subject to inspection by any federal revenue agent during business hours.[489] Similar requirements are imposed upon wholesale dealers in liquor.[490] Retail dealers must keep a record, in book form located in their business establishment, of all receipts of alcoholic beverages together with the respective dates, quantities, and names of suppliers thereof, such record to be made available to any internal revenue officer.[491] As respects all of these requirements there can be no doubt that the legislative purpose is grounded in a desire to facilitate the collection of revenue due to the federal government.[492]

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[488]26 U.S.C. § 5180 (1970).

[489]26 U.S.C. § 5207 (1970).

[490]26 U.S.C. §§ 5115, 5114 (1970).

[491]26 U.S.C. §§ 5124, 5146 (1970).

[492]See 26 U.S.C. § 5061 (1970).

A similar motive may have prompted parallel state legislation which exists universally. However, the states have demonstrated a less than uniform approach to the class of individuals from whom information is sought. Some have made the reporting requirement applicable to virtually anyone associated in any way with income attributable to alcoholic beverages.[493] Others merely require records and reports from manufacturers, distributors, and exporters.[494] Three others designate manufacturers, importers, and retail sellers as those from whom reports are due.[495] In two states reports are required from those who manufacture, sell, or store such beverages.[496] Four states limit reporting requirements to manufacturers and wholesalers[497]; two

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[493]Ala. Code Ann. tit. 29, §§ 55-56 (1958); Ga. Code Ann. § 58-1022 (1968); Wis. Stat. Ann. § 139.11 (1957).

[494]Fla. Stat. Ann. § 561.55 (Supp. 1973); Ill. Stat. Ann. ch. 43, § 125 (Supp. 1973-1974); Md. Code Ann. art. 2B, § 144 (1957).

[495]Ariz. Rev. Stat. Ann. § 4-222 (Supp. 1973); Del. Code Ann. tit. 4, § 718 (Supp. 1970); Mass. Gen. L. Ann. ch. 138, § 21 (Supp. 1973).

[496]Miss. Code Ann. § 67-1-37 (1972); W. Va. Code Ann. § 60-4-16 (1966).

[497]La. Rev. Stat. Ann. § 26:149 (1969); Mo. Stat. Ann. § 311.550 (Supp. 1973); N.M. Stat. Ann. § 46-5-21 (1953); Neb. Rev. Stat. Ann. § 53-164.01 (1943).

others single out wholesalers and retailers.[498] Wholesalers are the only ones required to make reports in four states[499] while only retailers are similarly treated in another.[500] Most states have seen fit to simply convey a broad grant of power to their respective state administrative agencies enabling those entities to prescribe whatever rules and regulations as are deemed appropriate to the implementation of the states' liquor laws.[501]

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[498]N.Y. Alco. & Rev. Contr. L. Ann. §§ 104, 105 (McKinney, 1970); N.D. Cent. Code Ann. § 5-03-08 (1959).

[499]Conn. Gen. Stat. Ann. § 12-437 (1972); Ky. Rev. Stat. Ann. § 243.850 (1969); Nev. Rev. Stat. Ann. § 369.480 (1967); S.C. Code L. Ann. § 4-75 (1962).

[500]Me. Rev. Stat. Ann. tit. 28, § 351 (Supp. 1973-1974).

[501]Alaska Stat. Ann. § 04.05.040(8) (1962); Ark. Stat. Ann. § 48-203i (1964); Cal. Rev. & Tax. Code Ann. § 324-52 (Deering, 1958); Colo. Rev. Stat. Ann. § 75-2-6 (1963); Idaho Code Ann. § 23-207 (Supp. 1972); Ind. Stat. Ann. tit. 7.1, art. 2, § 3-3 (Burn's Supp. 1973); Iowa Code Ann. § 123.21 (Supp. 1973); Hawaii Rev. Stat. Ann. § 281-17 (1968); Kan. Stat. Ann. § 41-210 (Supp. 1972); Mich. Comp. L. Ann. § 436.7a (1967); Minn. Stat. Ann. § 340.51 (1972); Mont. Rev. Code Ann. § 4-113 (1947); N.H. Rev. Stat. Ann. § 176:12 (1964); N.J. Stat. Ann. § 33:1-39 (Supp. 1973-1974); N.C. Gen. Stat. Ann. § 18A-15 (Supp. 1971); Ohio Rev. Code Ann. § 4301.10 (Supp. 1972); Okla. Stat. Ann. tit. 37, § 552 (1951); Ore. Rev. Stat. Ann. § 471.785 (1971-1972); Pa. Stat. Ann. tit. 72, § 727 (1949); R.I. Gen. L. Ann. § 3-2-2 (Supp. 1972); S.D. Comp. L. Ann. § 35-10-1 (1967); Tenn. Code Ann. § 57-109 (1968); Tex. Pen. Code Ann. art. 666-6 (1952); Utah Code Ann. § 32-1-6 (Supp. 1973); Vt. Stat. Ann. tit. 7, § 108 (1972); Va. Code Ann. § 4-11 (1950); Wash. Rev. Code Ann. § 66.08.030 (Supp. 1972); Wyo. Stat. Ann. § 12-39 (1957).

The result of the promulgation of these federal and state statutes is the creation of an interlocking system of laws such as was found to exist in the Marchetti-Grosso situation. This analogy was so compelling that it prompted numerous appeals of convictions for alcohol-related offenses based upon the holdings in those cases. These attempts, however, proved uniformly unsuccessful.[502] The case of United States v. Hunt[503] is fairly representative of the judicial approach to the problem. There the appellee was convicted of various offenses including his failure to comply with federal liquor registration, bonding, and posting requirements. He contended, at trial and on appeal, that compliance would have violated his privilege against self-incrimination and that, in reliance upon Marchetti-Grosso, the courts should declare the privilege to be a complete bar to prosecution for his omissions. Only by distinguishing those cases could the appellate court uphold the conviction, and this is what it set out to do. Initially, it noted that Marchetti-Grosso were decided

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[502] See e.g., United States v. Walden, 411 F.2d 1109 (4th Cir. 1969); Brown v. United States, 401 F.2d 769 (5th Cir. 1968); United States v. Whitehead, 424 F.2d 446 (6th Cir. 1970).

[503] 419 F.2d 1 (3d Cir. 1969), cert. denied, 397 U.S. 1016 (1970).

against a background scheme of comprehensive state and federal statutes which were directed at a specific group and which proscribed certain activity; that there was a dual legislative purpose in each case--the generating of income and the exchange of information needed to suppress the activity through state and federal prosecutions; and that these combined to produce a real and appreciable risk of self-incrimination.[504] The court found the first element missing in the instant case because, despite a recognition that the field of activity in question was permeated with criminal statutes, nonetheless, the statutes at issue were not directed at a select group, but rather at everyone engaged in the business.[505] Further, here was a clearly regulatory statute which was not intended to be suppressive irrespective of the statutory authority[506] for the exchange of revenue information between tax officials and prosecutors.[507] Most importantly, the court observed that in the precedents relied upon by appellee the activity involved was unlawful, whereas appellee was engaged in "a lawful activ-

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[504] Id. at 2.

[505] Id. at 3.

[506] 26 U.S.C. § 6107 (1970).

[507] 419 F.2d 1, 3 (1969).

ity which was done in an unlawful manner."[508] To make such a distinction is to miss the basic point made by the Court in Marchetti, that being that the question was not whether the recalcitrant registrant has a right to engage in unlawful activity but rather whether once embarked upon that unlawful activity he is protected by the privilege.[509] In this regard the appellate court surely erred to the prejudice of the appellee.

Registration and reporting requirements instituted by federal and state statutes extend to yet another area which has been explored by the Supreme Court. Concurrently with Marchetti and Grosso came the decision in Haynes v. United States.[510] The issue there was what relation, if any, the privilege against self-incrimination had to the offense of the knowing possession of a firearm which had not been registered in accordance with the provisions of a federal statute. At the time that this case arose there existed both federal and state statutes, surviving to the present, which pervaded this area of law enforcement

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[508] Id. at 2-3 (emphasis original).

[509] See notes 470-471 supra and accompanying text. Cf. California v. Byers, 402 U.S. 424, 470 (1971)(Brennan, Douglas, and Marshall, JJ., dissenting).

[510] 390 U.S. 85 (1968).

concern. Federal law prohibits all persons except licensed importers, manufacturers, or dealers from engaging in the business of importing, manufacturing, or dealing in specific classes of firearms or ammunition, or shipping, transporting, or receiving these items in interstate or foreign commerce.[511] These individuals are required to register annually in their respective revenue districts, supplying their names and addresses.[512] A special tax is levied upon such activity[513] and those subject to the tax are required to maintain records respecting the manufacture, receipt, sale, or other disposition of the specified items,[514] such records being subject to inspection by any revenue officer.[515] Additionally, all possessors of firearms of a specified class were subject to a registration requirement which included furnishing the name and address of the person entitled to possession, an identification of the firearm, and

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[511] 18 U.S.C. § 922(a)(1) (1970).

[512] 28 U.S.C. § 5802 (1970).

[513] 26 U.S.C. § 5801 (1970).

[514] 26 U.S.C. § 5843 (1970).

[515] 18 U.S.C. § 923(g) (1970).

the date of registration.[516] Similar provisions exist under statutes in thirty-five states.[517] Mere possession of a firearm is sufficient to require registration in four states.[518] Four other states provide a similar requirement for the purchase of any type of firearm.[519] In one-fourth of these jurisdictions the sale of any weapon capable of being concealed upon the person is conditioned upon reporting requirements.[520] The duty to provide information concerning the sale of pistols and revolvers is imposed by statute in fourteen states.[521] Over one-third of the states

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[516] 26 U.S.C. § 5841 (1967). This provision has subsequently been repealed. See Act of Oct. 22, 1968, Pub. L. No. 90-618, 82 Stat. 1227.

[517] One state specifically prohibits registration and reporting requirements with respect to firearms. See Ariz. Rev. Stat. Ann. § 13-918 (1956).

[518] Ha. Rev. Stat. Ann. § 134-2 (Supp. 1972); La. Rev. Stat. Ann. § 40:1783 (1965); Mass. Gen. L. Ann. ch. 140, § 129B (Supp. 1973); N.C. Gen. Stat. Ann. § 14-404 (1969).

[519] Me. Rev. Stat. Ann. tit. 15, § 455 (1964); Mich. Comp. L. Ann. § 750.232 (1968); S.D. Comp. L. Ann. § 23-7-10 (1967); Wyo. Stat. Ann. § 6-243 (1957).

[520] Ala. Code Ann. tit. 51, § 572 (1958); Cal. Pen. Code Ann. § 12076 (Deering Supp. 1973); Del. Code Ann. tit. 24, § 904 (1953); Ga. Code Ann. § 92A-901 (1972); Ill. Stat. Ann. ch. 38, § 24-4 (Supp. 1973-1974); Iowa Code Ann. § 695.21 (1946); Md. Code Ann. art. 27, § 442 (Supp. 1973); Mo. Stat. Ann. § 564.630 (Supp. 1973); Ore. Rev. Stat. Ann. § 166.410 (1971-1972).

[521] Conn. Gen. Stat. Ann. § 29-33 (Supp. 1973); Ind.

with firearms legislation provide provisions relating to machine guns; some prohibit their possession entirely[522] while others specify a reporting requirement which includes the provision that possession absent registration is presumptive evidence of possession with intent of use for an offensive or aggressive purpose.[523] Registration data in all cases extends to the name and address of the purchaser or possessor and may include the latter's occupation as well as a full description of the weapon or device.[524] To this some states add a requirement for an indication of the registrant's occupation and address thereof[525]; others man-

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Stat. Ann. tit. 35, art. 23, § 4.1-7 (Burns, 1972); Miss. Code Ann. § 45-9-5 (1972); N.H. Rev. Stat. Ann. § 159:7 (1964); N.J. Stat. Ann. § 2A:151-35 (1969); N.Y. Pen. L. Ann. § 400.00 (McKinney Supp. 1973- 1974); N.D. Cent. Code Ann. § 62-01-09 (1960); R.I. Gen. L. Ann. § 11-47-35 (1956); S.C. Code L. Ann. §§ 16-129.4 (Supp. 1971); Tenn. Code Ann. § 39-4904 (Supp. 1973); Utah Code Ann. § 76-10-519 (1953); Vt. Stat. Ann. tit. 13, § 4006 (1958); Wash. Rev. Code Ann. § 9.41.110 (Supp. 1972); W. Va. Code Ann. § 61-7-9 (1966).

[522] See e.g., Fla. Stat. Ann. § 790.221 (Supp. 1973); Neb. Rev. Stat. Ann. § 28-1010 (1943).

[523] See e.g., Ark. Stat. Ann. § 41-4514 (1964); Wis. Stat. Ann. § 164.01 (1957).

[524] See e.g., Conn. Gen. Stat. Ann. § 29-33 (Supp. 1973); Miss. Code Ann. § 45-9-5 (1972).

[525] See e.g., La. Rev. Stat. Ann. § 40:1783 (1965); Mich. Comp. L. Ann. § 750.232 (1968).

date a full description of the applicant or possessor[526] which may include the taking of photographs and fingerprints.[527] Most states with these statutory registration and recording requirements provide for initial local law-enforcement and/or prosecutorial officials' access to the information submitted[528] as well as inspection of records on an individual basis at any time.[529]

Again the Supreme Court was faced with a comprehensive statutory scheme aimed at those who engaged in a particular activity and it reacted in what was by then a predictable manner. Specifically, the petitioner in Haynes had been convicted of a federal offense which he claimed was brought about by fear of a state prosecution which would have resulted had the weapon he possessed been registered in accordance with the provisions of the federal statute. However, because the appellant had not been convicted

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[526] See e.g., Ind. Stat. Ann. tit. 35, art. 23, § 4.1-7 (Burns, 1972); R.I. Gen. L. Ann. § 11-47-35 (1956).

[527] See e.g., N.Y. Pen. L. Ann. § 400.00 (McKinney Supp. 1973-1974).

[528] See e.g., Conn. Gen. Stat. Ann. § 29-33 (Supp. 1973); N.H. Rev. Stat. Ann. § 159:7 (1964); R.I. Gen. L. Ann. § 11-47-35 (1956).

[529] See e.g., Ala. Code Ann. tit. 51, § 572 (1958); Del. Code Ann. tit. 24, § 904 (1953); Me. Rev. Stat. Ann. tit. 15, § 455 (1964).

of having failed to register the weapon, the Court was required to determine whether the elements of the possessory offense differed from those of the offense of failure to register. After concluding that Congress intended the registration provision to incorporate the possession requirement, thereby making the elements of both offenses identical,[530] the opinion went on to consider whether a compulsion to register violated the petitioner's privilege against self-incrimination. As in Marchetti-Grosso the Court found that the statute was directed at persons who were inherently suspect of criminal activity,[531] that these individuals faced a real and appreciable hazard of self-incrimination,[532] and that neither the presence of a regulatory purpose nor the application of the "public records" doctrine would serve to undermine the validity of the claim of privilege.[533] Once more the Court refused to impose restrictions on the use of information compelled by the statute, opting instead to make the invocation of the privilege

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[530] Haynes v. United States, 390 U.S. 85 (1968).

[531] Id. at 96-97.

[532] Id. at 97.

[533] Id. at 98-99.

a complete defense to crimes arising from the registration requirements.[534] For the third time in a single day the hint was given to Congress that immunity-oriented legislation might be in order.[535]

At this juncture it would be well to review what the Marchetti-Grosso-Haynes trilogy did not do. First, it did not impair Congress' power to tax unlawful activities nor did it invalidate the federal statutes requiring registration of gamblers and those who have some interest in certain classes of firearms. Second, it did not prohibit federal requirements for the filing of income tax returns nor prohibit the use of information compelled by any federal regulatory reporting requirement in a criminal case where the information obtained is considered to be imbued with "public" qualities. Third, it did not prohibit the use of information federally compelled in prosecutions of other federal offenses or any state offenses. Finally, it did not set out an immunity standard which would suffice to replace the privilege against self-incrimination in the event Congress evidenced a disposition to trade immunity for information.

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[534] Id. at 99-100.

[535] Id. at 98.

Four years after the Haynes decision the Supreme Court chose to hear another case involving a failure to file information relating to the possession of firearms. However, in the interim between Haynes and United States v. Freed[536] Congress had amended the applicable legislation in two respects. Instead of the transferee or possessor of the firearms having to comply with the requirements of registration, this burden now rested squarely on the shoulders of the transferor.[537] Additionally, the amended statute prohibited the use of information or evidence obtained via compliance with the registration requirements either directly or indirectly in a criminal proceeding.[538] In Freed, despite appellee's fears that registration would lead to a state prosecution, the Court found that the risks were "merely trifling or imaginary" due to representations by the Solicitor General that no information obtained via

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[536] 401 U.S. 601 (1971).

[537] See 26 U.S.C. § 5812 (1970). The transferee does not escape being identified; in order to fulfill registration requirements the transferor must submit a written application for transfer which includes a description of the firearm, the name and address of the transferor, and the name, address, photograph and fingerprints of the transferee. Id.

[538] See 26 U.S.C. § 5848 (1970).

filing was disclosed to any law enforcement authority[539] and, in any event, the information was compelled from the transferor thereby eliminating the ability of the transferee to raise the self-incrimination issue.[540] Further, it could not be said that the furnishing by the transferee of his photograph and fingerprints tended to incriminate him because such information could not be used against him in a federal criminal prosecution nor was it made available to state agencies.[541] All these factors combined to suggest to the Court that under the statutory scheme the self-incrimination hazards to the appellees were not real and thus there was no need to reach the question of the validity of the scope of the immunity granted.[542]

The implications of Freed are clear when viewed in conjunction with seemingly unrelated cases. Individuals may be forced to submit a variety of information to federal agencies if access to such information is considered to be necessary for the accomplishment of a valid governmental

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[539] 401 U.S. 601, 604 (1971).

[540] Id. at 606.

[541] Id.

[542] 401 U.S. 601, 606 n. 11 (1971).

purpose.[543] This information cannot be withheld if, despite its incriminatory nature, it is deemed to be possessed of "public" qualities.[544] The claim of privilege is only a valid bar to prosecution where the object of the statutory provisions aimed at is a group inherently suspect of criminal activity.[545] Even those in such a group are not protected if Congress has provided a statutory scheme which makes alleged hazards of self-incrimination "trifling" or "imaginary."[546] Such a statutory scheme is valid if it grants use and derivative use immunity.[547] Similar state statutes are likewise valid,[548] with the result being that information can be compelled by one state jurisdiction and

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[543] Cf. United States v. Sullivan, 274 U.S. 259 (1926).

[544] Cf. Shapiro v. United States, 335 U.S. 1 (1948).

[545] Cf. Marchetti v. United States, 390 U.S. 39 (1968). It is worthy of note that this bar to prosecution, grounded as it was on the Court's reluctance to impose use-restrictions on the compelled information due to the burden which would thereby be placed on local law enforcement agencies, has probably seen its final days. Compare 390 U.S. 39, 59 (1968) with Kastigar v. United States, 406 U.S. 441, 460 (1972).

[546] See United States v. Freed, 401 U.S. 601 (1971).

[547] Cf. Kastigar v. United States, 406 U.S. 441 (1972).

[548] Cf. Zicarelli v. Investigation Commission, 406 U.S. 472 (1972).

utilized in the prosecution's case in chief in another state jurisdiction, as well as in a prosecution in the compelling state or in a federal prosecution, for rebuttal or impeachment purposes.[549] Additionally, any compelling jurisdiction may be able to use the information extracted for rebuttal or impeachment purposes in the trial of other offenses[550] or as part of its case in chief for the same or other offenses if the accused is unable to successfully challenge prosecution representations that the evidence has been arrived at from an untainted source.[551] Thus the governmental quest for information, implemented by legislation, may indeed lead to the incrimination of any individual irrespective of the activity in which he is engaged. One need not look long and hard to find a perfect example.

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[549] Cf. Harris v. New York, 401 U.S. 222 (1971); Murphy v. Waterfront Commission of New York, 378 U.S. 52 (1964).

[550] Cf. Mackey v. United States, 401 U.S. 667 (1971). Here the Court, while refusing to apply Marchetti-Grosso retroactively, indicated that information compelled respecting the payment of wagering excise taxes could not be used by the prosecution in its case in chief on charges of income tax evasion.

[551] Cf. Kastigar v. United States, 406 U.S. 441, 467-471 (Marshall, J., dissenting).

When it decided the case of California v. Byers[552] the Supreme Court was involved with a factual context common to millions of citizens--the operation of a motor vehicle. There the respondent was convicted in a state court of having failed to stop at the scene of an accident and concurrently disclosing his name and address. Such statutes were, and are, in force in every state. While one state requires that the driver of a motor vehicle furnish his name, address, and vehicle registration number only where his vehicle is involved in an accident which results in injury or death,[553] fully one-half of the states also require this to be done where the accident results in damage to any vehicle.[554] Most of these also require that the

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[552]402 U.S. 424 (1971).

[553]Del. Code Ann. tit. 21, § 4150 (1953).

[554]Ala. Code Ann. tit. 36, § 128 (1958); Alaska Stat. Ann. § 28.35.060 (1962); Ariz. Rev. Stat. Ann. § 28-663 (1956); Ark. Stat. Ann. § 75-903 (1957); Ga. Code Ann. § 68-1620 (1967); Idaho Code Ann. § 49-1003 (1949); Ill. Stat. Ann. ch. 95½, § 11-403 (1971); Ind. Stat. Ann. tit. 9, art. 4, § 1-42 (Burns, 1972); Iowa Code Ann. § 321.263 (1966); Me. Rev. Stat. Ann. tit. 29, § 896 (1964); Mich. Comp. L. Ann. § 257.619 (1967); Minn. Stat. Ann. § 169.09 (1960); Miss. Code Ann. § 63-3-405 (1972); Mont. Rev. Code Ann. § 32-1204 (1947); N.M. Stat. Ann. § 64-17-3 (1953); N.D. Cent. Code Ann. § 39-08-06 (1972); Okla. Stat. Ann. tit. 47, § 10-104 (1962); Pa. Stat. Ann. tit. 75, § 1027 (1971); S.C. Code L. Ann. § 46-323 (1962); Tenn. Code Ann. § 59-1003 (1968); Utah Code Ann. § 41-6-31 (1953); Vt. Stat. Ann. tit. 23, § 1128 (Supp. 1973); Wash. Rev. Code Ann. § 46.52.020 (1970);

driver of the vehicle exhibit, upon request and if available, his driver's license,[555] and one state predicates the giving of all such information upon a request.[556] In thirteen states similar information is required where the accident results in injury, death, or property damage of any kind.[557] Under these latter circumstances one state compels the production of the driver's insurance identification card[558]; another state conditions this disclosure of information on a request having been made.[559] Five other states

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Wis. Stat. Ann. § 346.67 (1971); Wyo. Stat. Ann. § 31-220 (1957).

[555] E.g., Ark. Stat. Ann. § 75-903 (1957); Miss. Code Ann. § 63-3-405 (1972); W.Va. Code Ann. § 17C-4-3 (1966).

[556] R.I. Gen. L. Ann. § 31-26-3 (Supp. 1972).

[557] Conn. Gen. Stat. Ann. § 14-224 (1970); Cal. Veh. Code Ann. §§ 2002, 2003 (Deering, 1972); Fla. Stat. Ann. § 316.062 (Supp. 1973); Kan. Stat. Ann. § 8-520 (Supp. 1972); La. Rev. Stat. Ann. § 14:100 (Supp. 1973); Md. Code Ann. art. 66½, § 10-104 (1957); Mass. Gen. L. Ann. ch. 90, § 24(2)(a) (Supp. 1973); Neb. Rev. Stat. Ann. § 39-762 (1943); Nev. Rev. Stat. Ann. § 484.223 (1967); N.J. Stat. Ann. § 39:4-129 (1973); N.C. Gen. Stat. Ann. § 20-166 (1965); S.D. Comp. L. Ann. § 32-34-3 (Supp. 1973); Va. Code Ann. § 46.1-176 (1950).

[558] N.Y. Veh. & Traff. L. Ann. § 600 (McKinney Supp. 1973-1974).

[559] Ohio Rev. Code Ann. § 4549.021 (Supp. 1972).

expand these disclosure requirements to include the names and addresses of all occupants of the motor vehicle.[560] All states make provisions for the imposition of both fines and incarceration for non-compliance[561] and most states provide for the mandatory revocation of driver's licenses as an ancillary penalty.[562] While the Court acknowledged in Byers that criminal penalties do exist where the commands of the applicable statute are not met,[563] it proceeded to decide the case by placing reliance upon other factors. Noting that all compelled disclosure situations center upon the state's need for information, the plurality opinion asserted that the proper solution in each case was arrived at by balancing this need against the individual's claim of

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[560] Ha. Rev. Code Ann. § 291-2 (1968); N.H. Rev. Stat. Ann. § 262-A:67 (Supp. 1972); Ore. Rev. Stat. Ann. § 483.602 (1971-1972). Of the two states which also impose this requirement one makes the disclosure mandatory but limits the number of passengers involved to five. Ky. Rev. Stat. Ann. § 189.580 (1969). The other, while also providing this numerical limit conditions disclosure upon a request. Tex. Pen. Code Ann. art. 1150 (1961).

[561] See e.g., Alaska Stat. Ann. § 28.35.060 (1962); Ha. Rev. Stat. Ann. § 291-2 (1968); La. Rev. Stat. Ann. § 14:100 (Supp. 1973).

[562] See e.g., Ala. Code Ann. tit. 36, § 128 (1958); Del. Code Ann. tit. 21, § 4150 (1953); Ga. Code Ann. § 92A-608 (1967).

[563] 402 U.S. 424, 430 (1971).

the privilege against self-incrimination.[564] Here it appeared to these four Justices that, like Sullivan,[565] the statute at the root of the case at bar was regulatory in nature, rather than one aimed at a selective group inherently suspect of criminal activities.[566] Further, the nature of the information compelled was viewed as being non-testimonial[567] and arising from "an essentially neutral act."[568] As such, any disclosure required under these or similar circumstances could simply not be said to involve a "substantial risk of incrimination,"[569] and consequently

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[564] Id. at 427.

[565] United States v. Sullivan, 474 U.S. 259 (1926).

[566] 402 U.S. 424, 430 (1971). However, the effect of the statute's operation was clearly considered by four other Justices to be criminally oriented. See id. at 443 (Harlan, J., concurring); id. at 461 (Black, Douglas, and Brennan, JJ. dissenting).

[567] 402 U.S. 424, 431, 433 (1971). This characterization was decried by four Justices. See id. at 462-463 (Black, Douglas, and Brennan, JJ., dissenting); id. at 472-473 (Brennan, Douglas, and Marshall, JJ., dissenting).

[568] 402 U.S. 424, 430, 432 (1971). Three Justices were less than eager to embrace this position. See id. at 473 (Brennan, Douglas, and Marshall, JJ., dissenting).

[569] 402 U.S. 424, 431 (1971). Justices Brennan, Douglas, and Marshall eschewed this contention as well. See id. at 470. Totally ignored by the plurality opinion on this point was the fact that the respondent had embarked upon a course of conduct that was unlawful. Cf. Marchetti v. United States, 390 U.S. 39, 51-53 (1968).

the use-restrictions placed upon the disclosure by the state supreme court prior to the federal grant of certiorari simply was unnecessary.[570]

All of this served merely to camouflage the real impetus of the decision. What the plurality was clearly interested in was preserving to the government the power to promulgate and enforce self-reporting schemes which could not possibly be fully effective if allowed to remain in the shadow of the Fifth Amendment's privilege against self-incrimination.[571] In reaching the decision that it did the Court evidenced a preference to relegate the privilege to second place where the existence of the privilege poses a threat to governmental capacity to respond to what may be denominated as "societal needs,"[572] as well as an utter disregard of authoritative state pronouncements of how such needs could best be met.[573] The decision should

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[570] See 402 U.S. 424, 427 n. 3 (1971).

[571] See 402 U.S. 424, 431 (1971); cf. id. at 428-429; see id. at 451-452 (Harlan, J., concurring).

[572] See 402 U.S. 424, 452 (1968)(Harlan, J., concurring). To facilitate this result Justice Harlan would "explicitly limit" the Marchetti-Grosso line of cases. See id. at 453.

[573] Cf. 402 U.S. 424, 474-476 (1968)(Brennan, Douglas, and Marshall, JJ., dissenting).

serve as a warning that the Court, as presently constituted, has added another weapon to its arsenal of devices which it will not hesitate to employ to further emasculate the privilege against self-incrimination. That weapon is assembled by fitting a non-testimonial disclosure, stemming from an essentially neutral personal act, to a legislative regulatory act. Once assembled, the weapon may be utilized in a zone of combat which is free of the pitfalls of immunity grants.[574] There can be no doubt that such a weapon has the potential for not only producing cracks in the armor of the self-incrimination clause of the Fifth Amendment but for the complete destruction of the privilege as well.

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[574] Cf. 8 Wigmore, Evidence § 2259(c) at 367 n. 15 (McNaughton rev. 1961).

CHAPTER VI.

STATEMENTS MADE BY THE ACCUSED IN A PRIOR JUDICIAL OR QUASI-JUDICIAL PROCEEDING

No analysis of the area of testimonial self-incrimination would be complete without an investigation of those instances in which, despite the absence of compulsion *per se*, an individual has made statements which have the potential for serious consequences once that individual has become a defendant in a criminal case. While the proceedings in which these utterances are elicited inevitably are judicial in nature, to so restrict a consideration of an accused's vulnerability respecting future prosecutorial hazards would be erroneous. In that verbal disclosures originating in quasi-judicial proceedings may pose an equally substantial threat to personal liberty, they cannot be safely ignored. Their significance, though, is best illustrated subsequent to a synopsis of the law pertaining to proceedings wholly judicial in character.

As a general rule, if the person who is now the accused has formerly given testimony voluntarily in a prior

legal matter of any nature and in any capacity (witness or party) such testimony will be admissible, despite objection on self-incrimination grounds, at the present trial.[575] Specifically, absent statutory direction to the contrary, the voluntary testimony of the defendant, as a defendant, in a prior trial of the same criminal case may be used against him in a second trial of the same case, either substantively or for impeachment purposes, in both state and federal court.[576] Such testimony may be used in both state

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[575] See 58 Am. Jur. Witnesses § 100 (1948); 22A C.J.S. Criminal Law § 655 (1961). In this regard, mere deference to the service of a subpoena or a claim of ignorance of the privilege against self-incrimination will not vitiate what would otherwise be considered a voluntary statement. Id. Admissibility obtains despite any contention of hearsay and comports with the position taken by all major authorities. See 5 Wigmore, Evidence § 1370 (3d ed. 1940); McCormick, Evidence § 254 (2d ed. 1972); Uniform Rules of Evidence rule 63(3) (1953). Model Code of Evidence rule 503 (1942); Federal Rules of Evidence rule 804(b)(1) (1972).

[576] See e.g., Edmonds v. United States, 273 F.2d 108 (D.C. Cir. 1959); Warde v. United States, 158 F.2d 651 (D.C. Cir. 1946); Cady v. State, 198 Ga. 99, 31 S.E. 2d 38 (1944), cert. denied, 323 U.S. 676 (1944); State v. Tellay, 100 Utah 25, 110 P.2d 342 (1941). This is limited by the rule which prohibits substantive use of such testimony in the succeeding trial where the accused's testimony in the first trial was prompted by the prosecution's use of an illegally obtained confession. See e.g., Harrison v. United States, 392 U.S. 219 (1968).

and federal court in the second trial of the same criminal case even though the defendant does not take the witness stand in his own behalf in the later proceeding.[577] This is so where the former criminal case was founded upon the same or a different act or transaction and, if the same act or transaction was involved, irrespective of whether the former charge was identical to the one alleged in the subsequent case.[578] The vast majority of jurisdictions have held that the rule does not change where the defendant in the present criminal case testified as a mere witness in a prior criminal trial.[579] There appears to be no alteration in this basic rule in those cases, in both federal and

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[577] See e.g., Heller v. United States, 57 F.2d 627 (7th Cir. 1932), cert. denied, 286 U.S. 567 (1932); United States v. Bohle, 475 F.2d 872 (2d Cir. 1973); State v. King, 102 Kan. 155, 169 P. 557 (1917); Scherpig v. State, 112 Tex. Crim. 61, 13 S.W. 2d 872 (1929).

[578] See e.g., Crow v. Eyman, 459 F.2d 24 (9th Cir. 1972), cert. denied, 409 U.S. 867 (1972), reh'g denied, 409 U.S. 1029 (1972); State v. Simpson, 133 N.C. 676, 45 S.E. 567 (1903); Commonwealth v. Benedict, 113 Pa. 504, 173 A. 853 (1934).

[579] See e.g., United States v. Block, 88 F.2d 618 (2d Cir. 1937), cert. denied, 301 U.S. 690 (1937); Odiorne v. State, 249 Ala. 375, 31 S.W. 2d 132 (1947); State v. Grosnickle, 189 Wis. 17, 206 N.W. 895 (1926). Contra, Powell v. State, 23 So. 266 (Miss. 1898); State v. Harkness, 1 Wash. 2d 530, 96 P.2d 460 (1939).

state court, where the defendant in the present criminal case had previously testified either as a party or a mere witness in the course of a prior civil case.[580]

Similar results are reached where the accused in the present criminal action gave testimony as a deponent in a prior civil or criminal proceeding, regardless of whether such deposition was taken in connection with a federal or state case, if the deponent was not considered to be a criminal suspect at the time of the taking of such deposition.[581] And even where the civil deponent was considered to be a possible criminal defendant, portions of the deposition may be utilized to establish a nexus between the individual accused and the civil corporate defendant.[582]

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[580] See 4 Wigmore, Evidence § 1066 (3d ed. 1940); 8 id. § 2276 (McNaughton rev. 1961). See also Perlman v. United States, 247 U.S. 7 (1918); Hale v. United States, 406 F.2d 476 (10th Cir. 1969), cert. denied, 395 U.S. 977 (1969); Harrison v. State, 112 Ohio 429, 147 N.E. 650 (1925), aff'd per curiam, 270 U.S. 632 (1926); Choate v. State, 12 Okla. 560, 160 P.34 (1916). The underlying rationale is that such statements are in the nature of admissions. See e.g., Pope v. Allis, 115 U.S. 363 (1885); Taylor v. United States, 327 F.2d 232 (5th Cir. 1964).

[581] See 22A C.J.S. Criminal Law § 655 (1961). See also United States v. Bottone, 365 F.2d 389 (2d Cir. 1966), cert. denied, 385 U.S. 974 (1966); United States v. Wolfson, 294 F. Supp. 267 (D. Del. 1968); Owens v. Commonwealth, 181 Ky. 378, 205 S.W. 398 (1918).

[582] See e.g., United States v. Bacall, 443 F.2d 1050 (9th Cir. 1971).

Again, the contents of such deposition may be utilized either substantively or for impeachment purposes,[583] even where the deponent responds to written interrogatories.[584] However, if the same act or transaction may possibly form the basis for both civil and criminal sanctions against a defendant he is not powerless to thwart prosecutorial efforts directed at obtaining damaging information by way of otherwise normal civil discovery procedures. In a proper case the prosecution is required both to apprise the potential criminal defendant of his status and to act in good faith respecting its request for discovery; once this has been done the defendant's ability to prevent disclosure rests entirely on his privilege against self-incrimination, and of course this protection may be waived by the failure to assert it in a timely manner.[585] The most obvious reason for such a waiver would be the deponent's apprehension of the possibility of the rendering of a large civil judgment against him stemming from the widely recognized rule that where a party to a civil action refuses discovery the op-

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[583] See 5 Wigmore, Evidence § 1401 (3d ed. 1940); McCormick, Evidence § 253 (2d ed. 1972); Fed. R. Crim. P. 15(e); Fed. R. Civ. P. 32(a).

[584] See e.g., 58 Am. Jur. Witnesses § 100 (Supp. 1973).

[585] See e.g., United States v. Kordal, 397 U.S. 1 (1970).

posing party prevails.[586] This dilemma is not necessarily resolved even where the deponent has been acquitted of a related criminal charge since he still may validly claim the privilege so long as the requested answers would leave him vulnerable to prosecutions for other crimes.[587] Some relief is possible, however, at least for defendants facing civil-criminal actions in federal court. The alternative suggested by the Supreme Court, which rejected the concept of coercion in such a situation, was that the deponent seek a protective order under the appropriate federal rule[588] to postpone civil discovery pending termination of the criminal action.[589] Deponents similarly situated in state court proceedings can do naught but analogize with reference to the federal solution in those instances where the state concerned embraces a comparable rule of civil procedure. These

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[586] See e.g., Kisting v. Westchester Fire Insurance Company, 290 F. Supp. 141 (W.D. Wis. 1968), aff'd, 416 F.2d 967 (7th Cir. 1969); Franklin v. Franklin, 365 Mo. 442, 283 S.W. 2d 483 (1955); Stockham v. Stockham, 168 So. 2d 320 (Fla. 1963).

[587] See e.g., United States v. Second National Bank of Nashua, N.H., 48 F.R.D. 268 (D.N.H. 1969).

[588] Fed. R. Civ. P. 30(b).

[589] United States v. Kordel, 397 U.S. 1 (1970). See also Securities and Exchange Commission v. Stewart, 476 F. 2d 775 (2d Cir. 1973); London v. Patterson, 463 F.2d 97 (9th Cir. 1972).

principles, at least tacitly, are premised upon the presence of an informed accused who is in a position to make educated decisions. Unfortunately, in most quasi-judicial proceedings the accused does not enjoy this advantage and he therefore suffers accordingly. Of this there is perhaps no better example than the liberated prisoner who faces revocation of parole.

The decision to return to society one who has been incarcerated for the commission of a crime rests solely with the parole board which has absolute authority in this area. Conceptually, parole is deemed to be a matter of grace, rather than a right, and therefore the parole board, acting within the prescribed legislative parameters, has wide discretion concerning all facets of this status.[590] In this respect the keystone feature of parole, once granted, is the establishment of conditions with which the parolee has a duty to comply regardless of a formal declaration of consent thereto on the part of such parolee.[591] Violation of these conditions is sufficient to trigger reincarceration despite the fact that the underlying act or omission does not con-

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[590] See e.g., Shelton v. United States Board of Parole, 388 F.2d 567 (D.C. Cir. 1967).

[591] See e.g., Esquivel v. United States, 414 F.2d 607 (10th Cir. 1969).

stitute a crime under the laws of any jurisdiction.[592] In the overwhelming majority of states the respective legislatures have given broad grants of power to their parole boards to establish, in each case, parole conditions which meet the needs of both the parolee and society.[593] Of

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[592] See e.g., United States v. Chambers, 429 F.2d 410 (3d Cir. 1970).

[593] Alaska Stat. Ann. § 33.15.100 (Supp. 1973); Ark. Stat. Ann. § 43-2804 (Supp. 1973); Cal. Pen. Code Ann. § 3053 (Deering 1970); Colo. Rev. Stat. Ann. § 39-18-1(3)(a) (1963); Conn. Gen. Stat. Ann. § 54-124b (Supp. 1973); Del. Code Ann. tit. 11, § 4346(d) (Supp. 1971-1972); Ha. Rev. Stat. Ann. § 353-65 (Supp. 1972); Idaho Code Ann. § 20-223 (Supp. 1973); Ind. Stat. Ann. § 13-1609 (Supp. 1973); Iowa Code Ann. § 247.6 (1969); Kan. Stat. Ann. § 20-2302 (1964); Ky. Rev. Stat. Ann. § 439.330(c) (1969); Me. Rev. Stat. Ann. tit. 34, § 1671 (Supp. 1973); Md. Code Ann. art. 41, § 111 (Supp. 1973); Mass. Gen. L. Ann. ch. 27, § 5 (1973); Mich. Comp. L. Ann. § 791.233 (1968); Minn. Stat. Ann. § 243.12 (1972); Miss. Code Ann. § 47-7-17 (Supp. 1973); Mo. Stat. Ann. § 549.261 (Supp. 1974); Mont. Rev. Code Ann. § 95-3214 (Supp. 1974); Nev. Rev. Stat. Ann. § 213.110 (1971); N.H. Rev. Stat. Ann. § 607:31 (Supp. 1971); N.M. Stat. Ann. § 41-17-24 (1955); N.C. Gen. Stat. Ann. § 148-57 (1974); N.D. Cent. Code Ann. § 12-59-15 (Supp. 1973); Ohio Rev. Code Ann. § 2967.01 (Supp. 1972); Ore. Rev. Stat. Ann. ch. 144, § 144.075 (Supp. 1973-1974); Pa. Stat. Ann. tit. 61, § 331.23 (1964); R.I. Gen. L. Ann. § 13-8-16 (1956); S.C. Code L. Ann. § 55-578 (1962); Tenn. Code Ann. § 40-3612 (Supp. 1973); Tex. Code Crim. P. art. 42.12(c) 15 (Supp. 1974); Vt. Stat. Ann. tit. 28, § 1051 (1970); Va. Code Ann. § 53-238 (1950); Wash. Rev. Code Ann. § 9.95.110 (1961); W.Va. Code Ann. § 62-12-17 (1966); Wis. Stat. Ann. § 57.06 (Supp. 1973); Wyo. Stat. Ann. § 7-325 (Supp. 1973). One state has incorporated a similar provision in its state constitution. See Okla. Const. art. 6, § 10. Another has reached the same result via judicial pronouncement. See Sheppard v. State ex rel. Eyman, 18 Ariz. App. 108, 500 P.2d 639 (1972).

these, most require that the parolee remain within the state, unless he receives permission to leave,[594] and make periodic reports to his parole officer.[595] A few add specific mandates such as requiring the parolees to submit to psychiatric examinations[596] or medical examinations where the offense committed related to drug possession,[597] or to further his education and training by taking occupational training courses or general education courses.[598] Five states impose, as minimum requirements, that the parolee obtain the consent of the parole board prior to leaving the state, support his dependents, make reparation and restitution for his crime, abandon all evil associates and ways, and carry out the instructions of his parole officer.[599]

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[594] See e.g., Alaska Stat. Ann. § 33.15.180 (Supp. 1973); Minn. Stat. Ann. § 243.05 (1972); W.Va. Code Ann. § 62-12-15 (1966).

[595] See e.g., Conn. Gen. Stat. Ann. § 54-124b (Supp. 1973); N.H. Rev. Stat. Ann. § 607:44 (1955); Wis. Stat. Ann. § 57.06 (Supp. 1973).

[596] Kan. Stat. Ann. § 22-3712 (Supp. 1973); Md. Code Ann. art. 41, § 111 (Supp. 1973); N.D. Cent. Code Ann. § 12-59-14 (Supp. 1973).

[597] Nev. Rev. Stat. Ann. § 213.123 (1971).

[598] Ha. Rev. Stat. Ann. § 353-67 (Supp. 1972).

[599] See Ala. Code Ann. tit. 42, § 9 (1958); Fla. Stat. Ann. § 947.20 (1972); Ga. Code Ann. § 77-517 (1973); N.J. Stat. Ann. § 30:4-123.6 (1964); N.Y. Corr. L. Ann. § 6a (McKinney Supp. 1973-1974).

Other states have been more ambitious and have provided comprehensive legislative schemes pertaining to parole. Three of these specify that the parolee shall: (1) meet his family responsibilities, (2) devote himself to approved employment or occupation, (3) remain in a definite geographic locale unless given permission to leave these limits, (4) report to his parole officer initially upon being released and thereafter at such times and places as may be required, (5) reside at the address listed on his parole certificate and notify his parole officer of any change of address or occupation, (6) not have in his possession any firearms or other dangerous weapon unless granted written permission, (7) submit to available medical or psychiatric treatment if so required, (8) refrain from associating with persons known to be engaged in criminal activities or who have been convicted of a crime, and (9) satisfy such other conditions as the parole board may impose.[600] One state goes even further, requiring the parolee to obtain prior

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[600] See Ill. Stat. Ann. ch. 38, § 1003-3-7 (1973); La. Stat. Ann. § 15:574.4 (Supp. 1974); Neb. Rev. Stat. Ann. §§ 83-1116, -1117 (Supp. 1969). These provisions have their genesis in the Model Penal Code. See Model Penal Code art. 305, § 305.13 (Proposed Official Draft, 1962).

approval in order to marry, or purchase real and personal property,[601] and indicating that restrictions may include the prohibition of the use of intoxicating liquors or the frequenting of establishments where such beverages are sold, similar prohibitions respecting gambling, and the abstaining from criminal, vicious, lewd, or unworthy associations while so paroled.[602]

Parole within the federal sector has the attributes of the majority of state jurisdictions. A broad grant of power enables federal parole authorities to prescribe those conditions under which the released prisoner may maintain his freedom.[603] These conditions include restrictions upon the location of the parolee's residence and travels[604] and periodic reports by the parolee to his parole officer.[605] Other prohibitions may include the engaging in lawless activities, refraining from acting as an informer or special

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[601] S.D. Comp. L. Ann. § 23-58-9 (1967).

[602] S.D. Comp. L. Ann. § 23-60-17 (1967).

[603] See 18 U.S.C. § 4203 (1970); D.C. Code Ann. § 24-204(a) (1967).

[604] See 18 U.S.C. § 4203(a) (1970); 28 C.F.R. § 2.28 (1973).

[605] See 18 U.S.C. § 4203(a) (1970); 28 C.F.R. § 2.29 (1973).

agent for any law enforcement agency, refraining from the use of alcoholic beverages to excess, and the possession or use of any narcotic or other habit-forming or dangerous drug, refraining from associations with persons engaged in criminal activity or who have a criminal record, and possession of firearms or other dangerous weapons without written permission.[606]

Once a violation of a parole condition is alleged the parolee's continued liberty hinges on a decision made by the select group of individuals which comprise the parole board. Approximately one-third of the states, as well as the District of Columbia, have opted for a three-member board,[607] while slightly more than one-half have chosen to place parole responsibility in a body consisting of five members.[608] Five states provide for a board which numbers seven members[609] and two others specify that the board must

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[606] See United States ex rel. Sperling v. Fitzpatrick, 426 F.2d 1161, 1166-1167 n. 1 (2d Cir. 1970).

[607] See e.g., D.C. Code Ann. § 24-201a (1967); Iowa Code Ann. § 247.1 (1969); Mo. Stat. Ann. § 549.205 (Supp. 1974); W. Va. Code Ann. § 62-12-12 (1966).

[608] See e.g., Ga. Code Ann. § 77-501 (1973); Kan. Stat. Ann. § 22-3707 (Supp. 1973); Miss. Code Ann. § 47-7-5 (1972).

[609] Colo. Rev. Stat. Ann. § 39-18-1 (1963); Md. Code Ann. art. 41 § 108 (1957); Mass. Gen. L. Ann. ch. 27, § 4

have nine members.[610] The remainder of the states provide for parole boards with membership which exceeds this limit.[611] Twenty-three states and the federal statute predicate membership upon appointment by the appropriate chief executive subject to legislative approval[612]; in fifteen jurisdictions the latter requirement is not imposed.[613] Selection is based upon previous committee or commission recommendation in almost one-fourth of the states.[614] Membership is

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(1973); Ohio Rev. Code Ann. § 5149.10 (Supp. 1972); Wash. Rev. Code Ann. § 9.95.003 (Supp. 1973).

[610]Cal. Pen. Code Ann. § 5075 (Deering 1970); Wis. Stat. Ann. § 46.012 (1957). The federal parole statute takes an intermediate position by providing for eight members. See 18 U.S.C. § 4201 (1970). Such is consistent with the preference of the Model Penal Code for parole boards consisting of between three and nine members. See Model Penal Code art. 402, § 402.1 (Proposed Official Draft, 1962).

[611]See Ill. Stat. Ann. ch. 38, § 1003-3-1 (Supp. 1974) (ten members); Conn. Gen. Stat. Ann. § 54-124a (Supp. 1973) (eleven members); N.Y. Corr. L. Ann. § 6 (McKinney Supp. 1973-1974) (twelve members); S.C. Code L. Ann. § 55-551 (1962) (one member for each state congressional district).

[612]See e.g., 18 U.S.C. § 4201 (1970); Ha. Rev. Stat. Ann. § 353-61 (1968); Mont. Rev. Code Ann. § 95-3204 (Supp. 1973); Vt. Stat. Ann. tit. 28, § 1021 (1970).

[613]See e.g., Alaska Stat. Ann. § 33.15.010 (Supp. 1973); Nev. Rev. Stat. Ann. § 213.108 (1971); Tenn. Code Ann. § 40-3601 (Supp. 1973).

[614]See e.g., Ala. Code Ann. tit. 42, § 1 (1958); Fla. Stat. Ann. § 947.02 (1972); Ky. Rev. Stat. Ann. § 439.320 (1969).

apportioned between the affiliates of political parties in some states[615] while in others there is a clear legislative command which specifies that parole board members be appointed without regard to political persuasion.[616] Only one state requires that board membership include female and minority group representation.[617] The states are split about evenly between those in which parole board members are required to perform full-time duties[618] and those where such activity is on a part-time basis.[619] In five jurisdictions at least one of the members is expected to devote all of his efforts toward the business of the board.[620] Al-

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[615] See e.g., Idaho Code Ann. § 20-210 (Supp. 1973); N.M. Stat. Ann. § 42-9-7 (1953); Wyo. Stat. Ann. § 9-194.3 (Supp. 1973).

[616] See Ky. Rev. Stat. Ann. § 439.320 (1969); Md. Code Ann. art. 41, § 109 (1957); Miss. Code Ann. § 47-7-5 (1972); Wis. Stat. Ann. § 46.012 (1957).

[617] See Minn. Stat. Ann. § 241.045 (Supp. 1974).

[618] See e.g., Ariz. Rev. Stat. Ann. § 31-401 (Supp. 1973-1974); La. Stat. Ann. § 15:574.2 (Supp. 1974); Tex. Code Crim. P. art. 42.12(c)(13) (1966). The Model Penal Code makes use of a similar requirement. See Model Penal Code art. 402, § 402.1(2) (Proposed Official Draft, 1962).

[619] See e.g., Ark. Stat. Ann. § 43-2802.1 (Supp. 1973); Me. Rev. Stat. Ann. tit. 34, § 1551 (Supp. 1973); R.I. Gen. L. Ann. § 13-8-3 (1956).

[620] See D.C. Code Ann. § 24-201a (1967); Conn. Gen. Stat. Ann. § 54-124a (Supp. 1973); Del. Code Ann. tit. 11, § 4344 (Supp. 1971-1972); Miss. Code Ann. § 47-7-5 (1972);

though fully one-half of the states impose no professional qualifications as a prerequisite to board membership[621] seventeen states require that those appointed to the board have some degree of familiarity with penology and related social sciences.[622] Four states specifically provide that at least one board member be a physician who is either a qualified psychiatrist, neurologist, or psychologist[623]; two of these states and two others require that board membership include an attorney.[624] One state statute precludes more than one member from the same professional discipline[625]

Neb. Rev. Stat. Ann. § 83-191 (Supp. 1969).

[621] See e.g., N.H. Rev. Stat. Ann. § 607:31 (Supp. 1971); Ore. Rev. Stat. Ann. ch. 144, § 144.005 (Supp. 1973-1974); Pa. Stat. Ann. tit. 61, § 331.2 (Supp. 1973-1974).

[622] See e.g., Colo. Rev. Stat. Ann. § 39-18-1 (1963); N.J. Stat. Ann. § 30:4-123.1 (1964); Vt. Stat. Ann. tit. 28, § 1021 (1970).

[623] See Del. Code Ann. tit. 11, § 4341 (Supp. 1971-1972); Kan. Stat. Ann. § 22-3707 (Supp. 1973); Mass. Gen. L. Ann. ch. 27, § 4 (1973); R.I. Gen. L. Ann. § 13-8-2 (Supp. 1973).

[624] See Iowa Code Ann. § 247.1 (1969); Kan. Stat. Ann. § 22-3707 (Supp. 1973); N.D. Cent. Code Ann. § 12-59-01 (Supp. 1973); R.I. Gen. L. Ann. § 13-8-2 (Supp. 1973). The Model Penal Code is in accord. See Model Penal Code art. 402, § 402.1 (Proposed Official Draft, 1962).

[625] Ariz. Rev. Stat. Ann. § 31-401 (Supp. 1973-1974).

and only two states require a specific experience level.[626]

The decision of these parole boards respecting the ultimate disposition of alleged parole violators is most often made under conditions which are, at the very least, adverse to the individual parolee. All jurisdictions provide a procedure whereby a warrant may be issued where there is probable cause to believe that the parolee has violated one or more conditions of his parole.[627] Additionally, the parolee may be arrested even in the absence of such warrant where his or any other parole officer has probable cause to believe that a violation has occurred.[628] In either event, the parolee is subject to subsequent reincarceration once such arrest is effected, usually in the same institution from which he was paroled.[629] The same

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[626]Del. Code Ann. tit. 11, § 4341 (Supp. 1971-1972) (5 years, chairman only); Mass. Gen. L. Ann. ch. 27, § 4 (1973)(5 years, all members).

[627]See e.g., 18 U.S.C. § 4205 (1970); D.C. Code Ann. § 24-205 (1967); 28 C.F.R. § 2.35 (1973); Idaho Code Ann. § 20.228 (Supp. 1973); Mich. Comp. L. Ann. § 791.238 (Supp. 1973-1974); Miss. Code Ann. § 47-7-27 (1972).

[628]See e.g., Alaska Stat. Ann. § 33.15.210 (1962); Okla. Stat. Ann. tit. 57, § 332.12 (1969); Va. Code Ann. § 53-259 (1950).

[629]See e.g., Iowa Code Ann. § 247.9 (1969); N.C. Gen. Stat. Ann. § 148-61.1 (1974); R.I. Gen. L. Ann. § 13-8-17 (Supp. 1973).

result obtains in a significant minority of jurisdictions where a parole officer may arrest without a warrant where it appears that the parolee has lapsed or is about to lapse into criminal ways or company or is about to violate a condition of his parole.[630] Where the parolee has been arrested without a warrant, only two states prescribe a time limit for incarceration pending issuance, by the appropriate authority, of an arrest warrant.[631] And five jurisdictions have imposed time limits irrespective of whether or not such detention stemmed from an arrest without a warrant.[632] Only

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[630] See e.g., Ala. Code Ann. tit. 42, § 10 (1958); Mass. Gen. L. Ann. ch. 127, 149A (Supp. 1973); Tenn. Code Ann. § 40-3617 (Supp. 1973). The Model Penal Code provisions limit such arrests to those situations where the parolee has violated or is about to violate a condition of parole and an emergency exists whereby application for a warrant would create undue risk to the public or the parolee. See Model Penal Code art. 305, § 305.16(2) (Proposed Official Draft, 1962).

[631] Me. Rev. Stat. Ann. tit. 34, § 1675 (Supp. 1973) (end of next business day); N.Y. Corr. L. Ann. § 216 (McKinney 1968)(24 hours).

[632] See Colo. Rev. Stat. Ann. § 39-17-4 (1963)(12 days); Mass. Gen. L. Ann. ch. 127, § 149A (Supp. 1973)(15 days); Nev. Rev. Stat. Ann. § 213.150 (1971)(15 days); Ore. Rev. Stat. Ann. ch. 144, § 144.370 (Supp. 1973-1974)(15 days); N.J. Stat. Ann. § 30:4-123.22 (1964)(30 days). One additional state specifies a reasonable time. See N.C. Gen. Stat. Ann. § 148.61.1 (1974). The Model Penal Code provides for a limit of 60 days. See Model Penal Code art. 305, § 305.15 (Proposed Official Draft, 1962).

one-fifth of the jurisdictions give the parole board the option of either issuing an arrest warrant or a notice to appear to answer charges where there has been an allegation of a parole violation.[633] The parolee has the possibility of regaining his freedom in four jurisdictions by way of statutory provisions which allow bail under these circumstances[634]; however, most jurisdictions' statutes are silent on this subject and two states expressly prohibit bail for retaken parolees.[635] Thus it appears that the vast majority of federal and state parolees who face revocation of their legislatively created conditional liberty do so with the concurrent disability of being precluded, via mandatory incarceration, from actively assisting in the preparation of any defense to the allegations which might be raised.[636]

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[633] See e.g., Ark. Stat. Ann. § 43-28-10 (Supp. 1973); Mo. Stat. Ann. § 549.265 (Supp. 1974); Vt. Stat. Ann. tit. 28, § 1081 (1970).

[634] See Ga. Code Ann. § 77-518 (1973); N.J. Stat. Ann. § 30:4-132.32 (1964); S.C. Code L. Ann. § 55-616 (Supp. 1973); Wash. Rev. Code Ann. § 9.95.120 (Supp. 1973).

[635] See Fla. Stat. Ann. § 949.12 (1972); W.Va. Code Ann. § 62-12-19 (1966).

[636] It could cogently be argued that, at least in those situations where the violation does not constitute a crime or where only alleged misdemeanors are involved, the policies underlying the Bail Reform Act of 1966 should be

This alone would substantially operate to the parolee's prejudice; however, an additional factor must be considered. While it is ostensibly in the parolee's best interests to have the new allegation vis-a-vis the parole status resolved without undue delay, if the allegation forms the basis for a new criminal charge the parolee is in much the same position as one from whom civil discovery is required while criminal charges are pending or contemplated.[637] The singular dissimilarity is that in the case of the parolee revocation of parole is the price to be paid for the alleged offender's silence. In such a situation it would be advantageous from the parolee's point of view to have the revocation issue held in abeyance pending the outcome of the criminal proceeding. This procedure could not prejudice the government's ability to prosecute since the continuation of parole status is not deemed to be a waiver of prosecutorial rights.[638] Further, a prior judi-

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applied to the parole context. See 18 U.S.C. § 3146 et. seq. (1970). Cf. Wright v. United States, 262 A.2d 350 (D.C. App. Ct. 1970). But see In re Law, 109 Cal. Rptr. 573, 513 P.2d 621 (1973).

[637] See notes 585-590 supra and accompanying text.

[638] See e.g., United States ex rel. Lucia v. O'Donovan, 107 F. Supp. 347 (N.D. Ill. 1952)

cial determination of the factual issues involved may well preclude prolongated parole board consideration.[639] And this approach would be consistent with the rule formulated to suspend administrative revocation of occupational licenses where there is an attendant allegation of criminality.[640] Yet, only a handful of jurisdictions concede that the parole board has discretion to take such action pursuant to an appropriate request by the parolee[641] and nowhere is this made mandatory. Instead, both federal and state governments have shown a preference for a prompt resolution of the parole violation issue,[642] and this has undoubtedly been at the core of those judicial decisions which have rejected the concept of required suspension where

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[639] Cf. Baxter v. Davis, 405 F.2d 459 (1st Cir. 1971), cert. denied, 405 U.S. 999 (1972); In re Law, 109 Cal. Reptr. 573, 513 P.2d 621 (1973).

[640] See e.g., Silver v. McCamey, 221 F.2d 873 (D.C. Cir. 1955).

[641] See Savage v. United States Board of Parole, 422 F.2d 1248 (6th Cir. 1970); Allard v. Nelson, 423 F.2d 1216 (9th Cir. 1970); Small v. United States Board of Parole, 421 F.2d 1388 (10th Cir. 1970), cert. denied, 397 U.S. 1079 (1970); Rose v. Nickeson, 29 Conn. Sup. 102, 273 A.2d 290 (1970); Baxter v. Commonwealth, 268 N.E. 2d 670 (Mass. 1971); Wash. Rev. Code Ann. § 9.95.120 (Supp. 1973).

[642] See e.g., 28 C.F.R. § 2.40 (1973); Alaska Stat. Ann. § 33.15.220 (1962); N.M. Stat. Ann. § 41-17-28 (1955); Vt. Stat. Ann. tit. 28, § 1081 (1970).

the parolee interposes a claim of potential self-incrimination.

The case of Melson v. Sard[643] serves as an illuminating example. After initially backing away from deciding the issue of whether or not the privilege against self-incrimination could be claimed in order to forestall a parole board resolution of an alleged violation until completion of criminal proceedings,[644] the court chose to come to grips with the problem. In Melson a parolee had been arrested on a charge of murder. Attempting to have any decision respecting the revocation of his parole held in abeyance, he made a dual contention in his petition for declaratory and injunctive relief: first, disclosures made by him in an effort to avoid revocation could be used against him later at trial in violation of his Fifth Amendment privilege against self-incrimination, and, second, that such preliminary disclosures would uncover his possible trial tactics thereby weakening his defense. Although the court was not oblivious to the parolee's dilemma, it placed primary import upon insuring that the parole revocation issue

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[643] 402 F.2d 653 (D.C. Cir. 1968).

[644] The same court chose to treat the issue as moot in Boxley v. Rogers, 395 F.2d 631 (D.C. Cir. 1968).

was resolved promptly so as to fully afford the parolee an opportunity to effectively counter arguments favoring revocation.[645] The court's per curiam opinion found no merit in the parolee's second contention but the claim of self-incrimination forced the court to pause long enough to consider the possibility of a solution which would accommodate both that interest and the interest which, in its view, inhered in a prompt decision on the alleged violation. Drawing an analogy between the case at bar and those cases involving pre-trial motions to suppress illegally obtained evidence, the court went on to fashion another exclusionary rule.[646] That rule prohibited the affirmative

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[645] 402 F.2d 653, 654 (1968). Here the court stressed that prompt resolution was essential in light of the parolee's need for witnesses and evidence. The fact that most alleged parole violators are incapable of self-help due to mandatory incarceration has already been emphasized. See notes 627-636 supra and accompanying text. When to this is added the fact that counsel need not be provided for all alleged parole violators, see text infra, the court's reliance upon these factors to defeat a request for a delay in the parole revocation matter seems at best to be misplaced.

[646] 402 F.2d 653, 655 (1968) citing Simmons v. United States, 390 U.S. 377 (1968). The Melson court was fully in accord with the proposition that a parolee facing both revocation and prosecution was subjected to the type of coercion which would make his disclosures involuntary. See 402 F.2d 653, 655 (1968).

use against the parolee in any subsequent criminal prosecution of any statements made while contesting parole revocation.[647] However, while this might have provided the parolee with a sufficient measure of protection in bygone days the renunciation by the Supreme Court of transactional immunity[648] and the "tension doctrine"[649] has opened the door to real hazards which confront any parolee who today is faced with revocation of his parole.[650]

These hazards are best perceived by an analysis of those federal and state provisions which form the basis for parole revocation hearings. At one time it was generally believed that, in absence of statutory direction to the contrary, there was no absolute right to a hearing to determine whether or not parole should be revoked.[651] This

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[647]402 F.2d 653, 655 (1968).

[648]See Kastigar v. United States, 406 U.S. 441 (1972); Zicarelli v. United States, 406 U.S. 472 (1972). At the time Melson was decided it would have been unthinkable for the court there to have imposed any standard short of transactional immunity.

[649]See McGautha v. California, 402 U.S. 183 (1971).

[650]This was undoubtedly recognized by three of the dissenting Justices in McGautha who quoted from Melson with approval. See McGautha v. California, 402 U.S. 183, 239 (1971)(Douglas, Brennan, and Marshall, JJ., dissenting).

[651]See e.g., Rose v. Haskins, 388 F.2d 91 (6th Cir. 1968), cert. denied, 392 U.S. 946 (1968); Brown v. Department of Welfare, 351 S.W. 2d 183 (Ky. 1961).

rule was abrogated by the Supreme Court when it decided the case of Morrissey v. Brewer.[652] There the petitioner had alleged that his parole had been revoked without the benefit of a hearing and that this was violative of due process. In agreeing with this contention the Court laid down six requirements as the predicate for a valid parole revocation. These included: (1) written notice of the alleged violations, (2) disclosure to the parolee of the evidence against him, (3) an opportunity to be heard in person and to present witnesses and other evidence, (4) the right to confront and cross-examine adverse witnesses, (5) a hearing body which was both neutral and detached but not necessarily composed of lawyers or jurists, and (6) a written statement by the factfinders of the evidence relied upon and the reasons for the revocation of parole.[653] In all cases a hearing of this nature must be held within a reasonable time after the parolee has been taken into cus-

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[652] 408 U.S. 471 (1972).

[653] Id. at 489. The Court expressly limited the right of cross-examination and confrontation to those situations where the hearing officer does not have good cause for disallowing the same. Id.

tody.[654] While imposing these requirements the Court made it obvious that they did not apply where the parolee admitted the violation or where he had been convicted of another crime.[655] Further, there was no intention on the part of the Court to treat the hearing as if it were a criminal proceeding with the attendant benefits of the latter, such as a right to counsel.[656] And this was so even in the face of another Supreme Court decision which held that one who is subject to a probation revocation proceeding must have legal representation.[657] Even a casual reading of Morrissey suggests that it raised more questions than it answered. In this regard it should come as no surprise that the various federal and state jurisdictions have struggled to for-

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[654]The Court noted that a sixty-day period would not be unreasonable. See 408 U.S. 471, 488 (1972). The Model Penal Code contains a similar requirement. See Model Penal Code art. 305, § 305.15(1)(Proposed Official Draft, 1962).

[655]408 U.S. 471, 489 (1972). In this respect the Court certainly had not taken a position adverse to holding the revocation hearing in abeyance pending a judicial determination. See notes 637-639 supra and accompanying text.

[656]See 408 U.S. 471, 489 (1972).

[657]See Mempa v. Rhay, 389 U.S. 128 (1967) where the Court concluded that such proceedings were a "critical stage" of trial. Id. at 134.

mulate procedures which would serve their own needs while meeting Morrissey's mandate. As usually occurs in such endeavors the results have been far from uniform despite universal statutory treatment.

Clearly, under the Morrissey formulation, all parolees who face revocation[658] are entitled to present witnesses and evidence in their own behalf. This of itself does not provide any mechanism to secure whatever witnesses and evidence as are necessary to enable the parolee to adequately meet the allegations against him. While most states make statutory provision for the grant to their respective parole boards of the power to compel, via subpoena, the attendance of witnesses and the production of books, papers, and other documents,[659] and two extend this power to encompass depositions,[660] nowhere is there an

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[658] It should be noted that although Morrissey dealt with state paroles a lesser standard could not be thought to govern federal parolees. Cf. Bolling v. Sharpe, 347 U.S. 497, 500 (1954).

[659] See e.g., Ky. Rev. Stat. Ann. § 439.390 (1969); Me. Rev. Stat. Ann. tit. 34, § 1552 (Supp. 1973); S.D. Comp. L. Ann. § 23-58-8 (1967). These are apparently in deference to the position taken by the Model Penal Code. See Model Penal Code art. 402, § 402.2(5)(Proposed Official Draft, 1962).

[660] See Ill. Stat. Ann. ch. 38, § 1003-3-2 (1973); Ohio Rev. Code Ann. § 5149.11 (1970).

affirmative requirement that this power be exercised for the benefit of the parolee. Although fundamental fairness would dictate that such be done if the parole board utilizes this power to secure testimony or evidence which is adverse to the parolee, most often resort to this method by the board is unnecessary since its witnesses usually appear willingly or, due to the fact that the rules of evidence do not apply, this adverse matter may be obtained through resort to hearsay statements.[661] With federal parolees the problem is particularly acute since, by regulation, the parolee is required to make arrangements for the attendance of his own witnesses.[662] Because the parolee is most probably incarcerated[663] and because he has no way of obtaining evidence in the possession of one or more individuals who may be unwilling to come forward voluntarily, when he is confronted by adverse evidence which he knows he must rebut or risk revocation by default, his urge to

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[661] See e.g., N.M. Stat. Ann. § 20-4-1101 (Supp. 1973); Pa. Stat. Ann. tit. 61, § 331.22 (1964). See also Riggins v. Rhay, 75 Wash. 2d 271, 450 P.2d 806 (1969).

[662] See 28 C.F.R. § 2.41 (1973).

[663] See notes 627-636 supra and accompanying text.

speak becomes irresistible. It is precisely these conditions which give rise to the need for an attorney and it was this invaluable aid that the Court in Morrissey chose to acknowledge but otherwise ignore.[664]

Federal parolees and those in three states are entitled, under either the provisions of a statute or regulation, to counsel for representation at parole revocation hearings if such counsel is engaged by the parolee.[665] Four other states have reached the same result by way of judicial pronouncement.[666] Statutes in two other states also permit persons other than counsel to appear before the

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[664] See 408 U.S. 471, 489 (1972).

[665] See 28 C.F.R. § 2.41 (1973); D.C. Code Ann. § 24-206 (1967); Ala. Code Ann. tit. 42, § 12 (1958); Fla. Stat. Ann. § 947.23 (1972); La. Stat. Ann. § 574.9 (Supp. 1974). This conforms to requirements embodied in the Model Penal Code which also provides that the parole staff shall render reasonable aid to the parolee in preparation for the hearing. See Model Penal Code art. 305, § 305.15(1)(Proposed Official Draft, 1962). Only one state incorporates this latter provision. See La. Stat. Ann. § 574.9 (Supp. 1974).

[666] State v. Boggs, 49 Del. 277, 114 A.2d 663 (1955); Warren v. Michigan Parole Board, 23 Mich. App. 754, 179 N.W. 2d 664 (1970); People ex rel. Menechino v. Warden, 27 N.Y. 2d 376, 267 N.E. 2d 238 (1971); Commonwealth v. Tinson, 433 Pa. 328, 249 A.2d 549 (1969).

board on the parolee's behalf.[667] Appearances before the board by persons other than the parolee are expressly prohibited by statute in two states.[668] Courts in seven jurisdictions have adhered to this position.[669] The same divergence of opinion is evident where the right of indigent parolees to appointed counsel is concerned. Only in the federal sphere of influence and two states is such a possibility recognized under statutory authority. The federal statute makes the appointment of counsel discretionary depending upon the interests of justice[670]; one of

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[667] S.C. Code L. Ann. § 55-555 (1962); Vt. Stat. Ann. tit. 28, § 1055 (1970).

[668] See Tenn. Code Ann. § 40-3619 (Supp. 1973). Montana occupies the unique position of granting a prisoner the right to retained counsel for representation at a hearing to determine the initial parole question but denying this right where parole revocation is concerned. Compare Mont. Rev. Code Ann. § 95-3217 (Supp. 1973) with Mont. Rev. Code Ann. § 95-3220 (Supp. 1973).

[669] See Pope v. Superior Court, 88 Cal. Reptr. 483, 9 Cal. 3d 636 (1970); People ex rel. Harris v. Ragen, 81 F. Supp. 608 (N.D. Ill. 1949), aff'd, 117 F.2d 303 (7th Cir. 1949); Wingo v. Lyons, 432 S.W. 2d 821 (Ky. 1968); State v. Morales, 120 N.J. Sup. 197, 293 A.2d 672 (1972); Robinson v. Cox, 77 N.Mex. 55, 419 P.2d 253 (1966); John v. State, 160 N.W. 2d 37 (N.D. 1968); Chase v. Page, 456 P.2d 590 (Okla. Crim. App. 1969).

[670] 18 U.S.C. § 3006A (1970).

the state statutes conditions the right to appointed counsel upon sufficient funds being available,[671] while the other statute merely requires proof of indigency.[672] Of the four states which have squarely faced the issue in the absence of statutory authority two require that counsel be provided for indigent parolees[673] and two do not.[674] However, under limited circumstances indigent parolees may succeed in having counsel appointed especially where counsel is available to those who can afford it.

This is particularly true in the federal system. Since a basic right to counsel exists for federal parolees who appear at revocation hearings,[675] and indigents are at least entitled to counsel on a discretionary basis,[676] it

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[671] See Wash. Rev. Code Ann. § 9.95.122 (Supp. 1973).

[672] See W.Va. Code Ann. § 62-12-22 (Supp. 1973).

[673] See Perry v. Willard, 247 Ore. 145, 427 P.2d 1020 (1967); People ex rel. Menechino v. Warden, 27 N.Y. 2d 376, 267 N.E. 2d 238 (1971).

[674] See Lawyer v. State, 46 Ala. App. 190, 239 So. 2d 332 (1970); S.C. Op. Att'y Gen. No. 2351 (1966-1967).

[675] See 28 C.F.R. § 2.41 (1973).

[676] See 18 U.S.C. § 3006A (1970).

would seem that under the principles of due process and equal protection indigent federal parolees should be provided with counsel in all cases of revocation. This view is shared by only two federal courts of appeal, both of which have predicated their decisions upon the narrow ground of equal protection.[677] One of these same courts has gone further and held that where a state statute exists which permits retained counsel to be present at parole revocation hearings the same right should accrue to indigent state parolees, again on the basis of equal protection.[678] Although this may be a step in the right direction, these decisions are of little comfort to those parolees who have the misfortune to be situated outside these specific jurisdictions.[679] While it has had the opportunity to definitively resolve the issue, the Supreme Court has succeeded in only muddying the judicial waters.

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[677] See Lane v. Att'y Gen. of the United States, 477 F.2d 847 (5th Cir. 1973); Earnest v. Willingham, 406 F.2d 681 (10th Cir. 1969).

[678] See Cottle v. Wainwright, 477 F.2d 269 (5th Cir. 1973).

[679] It should be remembered that only five states have statutes which allow the presence of counsel at parole revocation hearings. See notes 665 and 667 supra and accompanying text.

In Gagnon v. Scarpelli[680] a state probationer had been arrested in connection with the commission of a burglary. He admitted his participation in the crime but later recanted, claiming that his admission was made under duress and was untrue. Absent a probation revocation hearing, and without the benefit of counsel, the status of probation was revoked. The question before the Court was whether a probationer is entitled to a revocation hearing, and, if so, whether appointed counsel is required at such a hearing. For the first time it was conceded that no difference exists between parole and probation status[681] and thus, in reliance on Morrissey,[682] due process demanded that a revocation hearing precede the sanction of probation revocation.[683] The Court then went on to decide the second portion of the question but was careful to note that since the respondent did not attempt to retain counsel there was no occasion to reach the question of whether a parolee or a probationer has a right to retained counsel in situations

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[680] 93 S. Ct. 1756 (1973).

[681] Id. at 1759.

[682] Morrissey v. Brewer, 408 U.S. 471 (1972).

[683] 93 S. Ct. 1756, 1760 (1973).

other than those where state authorities would be required to furnish counsel for an indigent.[684] In the opinion of the majority,[685] written by Justice Powell, it was acknowledged that there were instances where the aid of counsel would substantially benefit the parolee in his fight to retain his conditional liberty. These would include cases where the uneducated parolee could not adequately present his version of a disputed set of facts or where cross-examination of witnesses or evaluation of complicated documentary evidence was required.[686] Even these, though, were not thought to be sufficient for the imposition of an inflexible constitutional rule.[687] More weight was given by the Court to the ramifications produced by such a rule. Particularly seized upon was the assumed fact that in most cases revocation succeeds conviction or an admission of guilt.[688] The majority also noted that any

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[684] Id. at 1760 n. 6.

[685] Justice Douglas was the lone dissenter and he viewed the situation as one where counsel was required due to the respondent's claim of a coerced confession. 93 S. Ct. 1756, 1764 (1973)(Douglas, J., dissenting).

[686] 93 S. Ct. 1756, 1762 (1973).

[687] Id. at 1762, 1763.

[688] The Court appears to beg the question; surely if the parolee was afforded the services of counsel he could

mitigating evidence which might be available to the parolee does not depend upon the services of counsel,[689] furnishing counsel to all indigent parolees would turn the revocation hearing into a full-blown adversary proceeding, and the result would be to make the hearing body more likely to resort to reincarceration since it "may be less tolerant of marginal deviant behavior" when it is forced into a quasi-judicial role.[690] Seeking a different approach the majority opinion was content to announce that the right to counsel for indigent parolees was to be determined, on a case-by-case basis, by the very entity which has the responsibility for the determination of the ultimate issue--the state authority which administers the probation and parole system. The bitter irony is that this was done in

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not be heard to complain at a later date that his confession was coerced. Further, the Court ignores the fact that there exists a preference for prompt resolution of the parole issue without awaiting the outcome of any associated criminal trial. See notes 641-642 supra and accompanying text.

[689] Overlooked is the incarceration of the parolee, see note 636 supra and accompanying text, in conjunction with his inability to compel the production of witnesses and evidence. See notes 659-662 supra and accompanying text.

[690] 93 S.Ct. 1756, 1762 (1973).

the name of fundamental fairness.[691] As its final action in the case the Court established prerequisites to aid state officials in the implementation of its new policy.[692] Initially, the parolee must be informed that he has a right to request counsel. If such a request is made counsel should be provided where the parolee makes a timely and colorable claim either that he did not violate the conditions of his release, or, if he did, that there are substantial reasons which justified or mitigated the violation, thereby making revocation inappropriate, which are complex or otherwise difficult to develop or present.[693] Additionally, parole authorities are charged with the responsibility of considering whether or not the parolee is capable of speaking effectively for himself, and are required to state in every case the reason for any denial of a request for counsel.[694] A more open invitation to self-incrimination abuses is difficult to imagine.[695]

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[691] See 93 S.Ct. 1756, 1763 (1973).

[692] Presumably, these would also apply where federal parole revocation is involved. See note 658 supra.

[693] 93 S.Ct. 1756, 1764 (1973).

[694] Id.

[695] Whether or not these pitfalls await all those who face parole revocation is unclear. Seven months after its

The plight of the parolee should be clear. Initially regaining his liberty, he must conform his conduct to conditions which curtail his freedom of action in a variety of ways. Variation from the established norm can, in many cases, subject him to a warrantless arrest. Except in a limited number of jurisdictions any retaken parolee remains incarcerated pending the resolution of the revocation issue. Such issue, as a general rule, takes precedence over criminal trials involving the same activity which formed the basis for the parolee's arrest, and efforts to have the revocation hearing held in abeyance pending the trial outcome will be unavailing. Denied compulsory process for witnesses and evidence and usually denied an attorney unless he can afford one, the parolee is exhorted by the Supreme Court to explain the specifics of his situation to the parole authorities so that they may determine whether or not he really needs the services of a lawyer.

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decision in Gagnon the Court chose to vacate and remand for further consideration in light of that opinion the single appellate court case which held that equal protection required the appointing of counsel for indigent parolees where state statute permits retained counsel to appear at revocation hearings. See Wainwright v. Cottle, 94 S.Ct. 221 (1973). Thus the question of whether and under what conditions counsel must be provided in these circumstances is an open one.

If the parolee chooses not to speak, his freedom as well as his ability to secure counsel will be inevitably forfeited; if he succumbs to the pressures which demand disclosure he does so in the absence of any meaningful safeguards which might prevent the use of these utterances against him in a later criminal case involving the same or different matters. Unlike the individual who testifies in a prior judicial or ancillary proceeding where there is most probably an opportunity to obtain legal advice, the parolee is left to flail about alone in the midst of a hostile environment. Under the circumstances any testimonial decision he makes is apt to be the wrong one.

CHAPTER VII.

CONCLUSION

The Fifth Amendment's privilege against self-incrimination has been described as "the essential mainstay of our adversary system."[696] If it is, then that system is in trouble. Far too often one who stands in the shadow of criminal jeopardy is powerless to constrain the forces of government which operate to extract utterances from him for use later in his own condemnation. In such cases even the defense attorney can do little, save alerting his client to potential hazards. Clients who have made involuntary statements while in police custody can take little comfort from the fact that these disclosures cannot be used against them in the prosecution's case in chief. Instead, an accused may opt to forego giving valuable testimony in his own behalf at trial, fearful that his former words will return to haunt him in the guise of rebuttal or impeaching evidence. Similarly, a defendant can no longer venture safely onto the witness stand to testify at a pre-trial

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[696] Miranda v. Arizona, 384 U.S. 436, 460 (1966).

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[696] Miranda v. Arizona, 384 U.S. 436, 460 (1966).

motion to suppress evidence allegedly illegally seized, especially where non-possessory crimes are involved, since the vitality of the underlying rationale which would have precluded future use of his testimony has been severely emasculated.

In a slightly different vein, those who have been summoned to appear and give testimony or produce other evidence before grand juries, legislative committees, or governmental administrative agencies may initially refuse to do so if the testimony or evidence would tend to incriminate them. However, such disclosure can be compelled by the simple expediency of granting immunity to the witness. As the current trend in this area is for immunity to extend only to the use and derivative use of the information extracted, there is a hiatus in meaningful protection respecting not only the acts which form the basis for the governmental inquiry but also any activity which might be alluded to by the witness during the course of his appearance. These dangers are accentuated where dual sovereignty exists and carry over to situations where the compelling vehicle is one or more of the mandatory disclosure statutes.

The hurdle of immunity grants need not delay compulsion where the client's mental condition is at issue.

By viewing the situation as either a waiver of the privilege or non-criminal in nature, governmental authorities may wrest information from an accused with virtual impunity. Legislative enactments which appear to protect the defendant from having his own disclosures utilized against him on the issue of guilt or innocence are well nigh meaningless where a unitary trial is conducted. Even a bifurcated trial does not insulate an accused from the use of these utterances for impeachment or rebuttal purposes or for any purpose at other trials involving different matters.

Parolees are particularly vulnerable to self-incriminating disclosures. Usually in custody and most often without counsel, they are under tremendous pressure to speak in the face of reincarceration for the unexpired portion of their original sentences. Devoid of power to compel witnesses or evidence which could aid their position, the onus is on them alone to answer the allegations even where a criminal trial founded upon the same set of facts is pending and where no protections exist respecting later use of the parolee's statement.

In all of these situations, once the speaker has yielded the damaging testimony the cat is out of the bag;

he can never get the cat back into the bag[697] and this inures to his everlasting detriment, for the prosecution can utilize this evidence in a variety of ways. It may alert government investigators to areas of inquiry not theretofore recognized as being connected with criminality and for which independent leads may readily be established. Subsequent probing may produce witnesses whose testimony will forge strong links in a chain of complicity between the accused and the crime currently charged as well as other crimes. Undoubtedly the prosecution may find the accused's compelled statements and other evidence arrived at by way of those statements indispensable when drawing up the charges and questioning witnesses in advance of trial. During the progress of the trial information uncovered by resort to the defendant's own words could influence the prosecution's approach to a theory of the case and the formulation of an opening statement, as well as decisions respecting the order of the presentation of evidence. This information would also be invaluable as an aid in formulating lines of questioning for both the direct examination of prosecution witnesses and the cross-examination

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[697]The metaphor was applied in a criminal context in United States v. Bayer, 331 U.S. 532 (1947).

of defense witnesses. Most importantly, its mere possession by the prosecution may deter the accused from taking the witness stand in his own behalf, a tactical advantage of immense proportions especially in those instances where the accused is the only possible defense witness. The net effect of all these possibilities is to shift the burden in criminal trials by enabling the prosecution, in derogation of its traditional role, to prove its case by direct or indirect resort to the accused's own testimonial disclosures. And every time it is allowed to do so the road back to the Star Chamber becomes easier to discern.

CHAPTER VIII.

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CHAPTER IX.

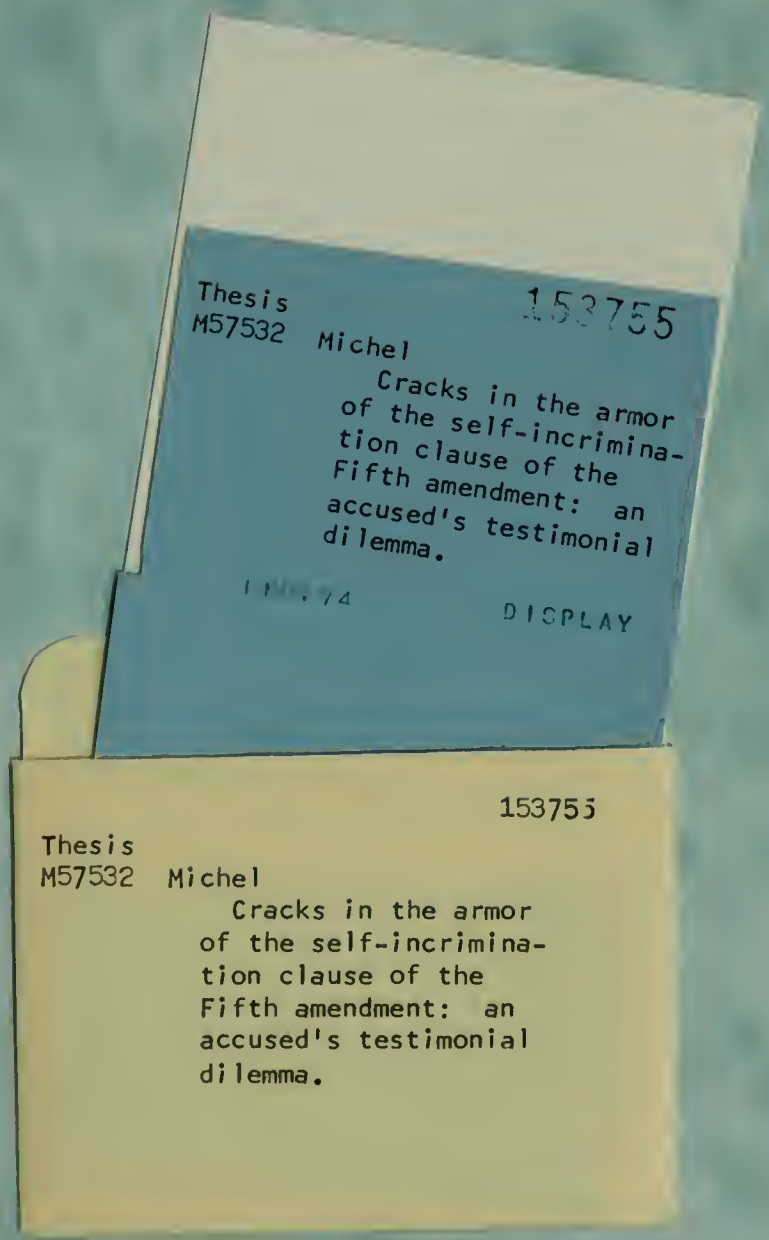
VITA

The writer was born in Newark, New Jersey on December 5, 1938, the elder of two sons of Mr. and Mrs. Harold Michel, currently residing in Wheeling, Illinois. He received his elementary education in the state of New York; his secondary education was completed in Northbrook, Illinois. In September, 1956 he entered the University of Mississippi under the NROTC Regular Program, graduating from that institution with a Bachelor of Arts degree and concomitantly being commissioned an Ensign in the United States Navy in 1960.

In September, 1966 Mr. Michel, while serving as a naval aviator with the U. S. Pacific Fleet, entered law school as a night student at the University of San Diego School of Law. The Juris Doctor degree was conferred upon him in 1971 by the University of Mississippi School of Law where he served on the Moot Court Board and the Editorial Board of the Mississippi Law Journal.

Mr. Michel, currently a Lieutenant Commander in the Judge Advocate General's Corps, United States Navy, is licensed to practice law before the Supreme Court of Mississippi, the Federal District Court for the Northern District of Mississippi, and the Supreme Court of the United States. He has been elected to membership in Phi Kappa Phi and Omicron Delta Kappa. His membership in professional associations includes the American Bar Association, the Criminal Justice Section of the American Bar Association, and the Mississippi Bar Association.

In August, 1973 he was admitted to the Graduate Division of the University of Miami School of Law. He is married to the former Marilyn Carr of Jay, Florida.



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Thesis
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